BANKERS' ADVANCES

THE BANKER'S LIBRARY
EDITED BY SIR JOHN PAGET, BART., K.C.

BANKERS' ADVANCES

BY

FRANCIS R. STEAD

ASSOCIATE (BY EXAMINATION) OF THE INSTITUTE OF BANKERS:

AUTHOR OF

"TITLE DEEDS AND THE RUDIMENTS OF REAL PROPERTY LAW"

LONDON
SIR ISAAC PITMAN & SONS, LTD., 1 AMEN CORNER, E.C.4
BATH, MELBOURNE AND NEW YORK

PRINTED BY SIR ISAAC PITMAN
& SONS, LTD., LONDON, BATH,
MELBOURNE AND NEW YORK

PREFACE

THE author has, in some measure, been tempted to write this book by reason of the paucity of collective modern literature on the subject-title hereof.

This does not pretend to be a treatise on bankers' securities; and the reader is assumed to be more or less conversant with general banking matters. For instance, no real attempt is made to examine the law on bills of exchange, to probe the inwardness of the legal estate, to solve the intricacies of foreign exchange, or to define the peculiar functions of the Bank of England. Nevertheless, so far as is essential to intelligible writing on the subject of bankers' advances, different forms and aspects of securities are discussed; and for greater lucidity frequent references are made to both case and statutory law, as well as to standard authorities on outstanding points. At the same time, the author has aimed to embody in his work the fruits of a fairly long and varied experience.

Certain comments on the text, by Sir John Paget, K.C., which appear in the form of foot-notes, are highly appreciated and gratefully acknowledged.

LONDON, 1919.

PITMAN'S
BUSINESS HANDBOOKS

AN ABRIDGED LIST OF PRACTICAL GUIDES FOR :: BUSINESS MEN AND ADVANCED STUDENTS ::

COMPLETE LIST OF COMMERCIAL BOOKS POST FREE ON APPLICATION

BOOK-KEEPING AND ACCOUNTS

ADVANCED ACCOUNTS. A Manual of Advanced Book-keeping and Accountancy for Accountants, Book-keepers and Business Men. Edited by ROGER N. CARTER, M.Com., F.C.A., *Lecturer on Accounting at the University of Manchester.* In demy 8vo, cloth gilt, 988 pp., **7s. 6d.** net.

AUDITING, ACCOUNTING AND BANKING. By FRANK DOWLER, A.C.A. and E. MARDINOR HARRIS, *Associate of the Institute of Bankers.* In demy 8vo, cloth gilt, 328 pp., **5s.** net.

THE PRINCIPLES OF AUDITING. A Practical Manual for Advanced Students and Practitioners. By F. R. M. DE PAULA (*of the firm of De Paula, Turner, Lake & Co.*), F.C.A. In demy 8vo, cloth gilt, 224 pp., **5s.** net.

ACCOUNTANCY. By F. W PIXLEY, F.C.A., *Barrister-at-Law, Ex-President of the Institute of Chartered Accountants.* In demy 8vo, cloth gilt, 318 pp., **6s.** net.

AUDITORS: THEIR DUTIES AND RESPONSIBILITIES. By the same Author. Eleventh Edition. In demy 8vo, cloth gilt, 732 pp., **21s.** net.

COST ACCOUNTS in Principle and Practice. By A. CLIFFORD RIDGWAY, F.C.A. In demy 8vo, cloth gilt, with 40 specially prepared forms, **5s.** net.

COMPANY ACCOUNTS. By ARTHUR COLES, F.C.I.S. With a Preface by CHARLES COMINS, F.C.A. In demy 8vo, cloth gilt, 356 pp., **7s. 6d.** net.

DICTIONARY OF BOOK-KEEPING. By R. J. PORTERS. In demy 8vo, 780 pp., **7s. 6d.** net.

MANUFACTURING BOOK-KEEPING AND COSTS. By GEORGE JOHNSON, F.C.I.S. In demy 8vo, cloth gilt, 120 pp., **3s. 6d.** net.

GOLD MINE ACCOUNTS AND COSTING. A Practical Manual for Officials, Accountants, Book-keepers, etc. By G. W. TAIT. In demy 8vo, cloth gilt, **5s.** net.

THE ACCOUNTS OF EXECUTORS, ADMINISTRATORS AND TRUSTEES. With a Summary of the Law in so far as it relates to Accounts. By WILLIAM B. PHILLIPS, A.C.A. (Hons. Inter. and Final), A.C.I.S. In demy 8vo, cloth gilt, 150 pp., **5s.** net.

PRACTICAL BOOK-KEEPING. By GEO. JOHNSON, F.C.I.S. In crown 8vo, cloth, 420 pp., **5s.** net.

RAILWAY ACCOUNTS AND FINANCE. Railway Companies (Accounts and Returns) Act, 1911. By ALLEN E. NEWHOOK, A.K.C. In demy 8vo, cloth gilt, 148 pp., **5s.** net.

DEPRECIATION AND WASTING ASSETS, dealing with their treatment in computing annual profit and loss. By P. D. LEAKE, F.C.A. In demy 8vo, cloth gilt, 257 pp., **12s. 6d.** net.

BUSINESS TRAINING

LECTURES ON BRITISH COMMERCE, including Finance, Insurance, Business and Industry. By the Rt. Hon. Frederick Huth Jackson, G. Armitage-Smith, M.A., D.Lit., Robert Bruce, C.B., Sir Douglas Owen, W. E. Barling, J. J. Bisgood, B.A., Allan Greenwell, F.G.S., James Graham. With a Preface by the Hon. W. Pember Reeves. In demy 8vo, cloth gilt, 295 pp., **7s. 6d.** net.

THE THEORY AND PRACTICE OF COMMERCE. Being a Complete Guide to Methods and Machinery of Business. Edited by F. Heelis, F.C.I.S., Assisted by Specialist Contributors. In demy 8vo, cloth gilt, 620 pp., with many facsimile forms, **6s.** net. Also in 2 vols., each, price **3s. 6d.** net.

THE PRINCIPLES AND PRACTICE OF COMMERCE. By James Stephenson, M.A., M.Com., B.Sc. In demy 8vo, cloth gilt, 650 pp., with many facsimile forms, **7s. 6d.** net.

THE PRINCIPLES AND PRACTICE OF COMMERCIAL CORRESPONDENCE. By the same Author. In demy 8vo, 320 pp., **7s. 6d.** net.

THE PRINCIPLES OF COMMERCIAL HISTORY. By the same Author. In demy 8vo, 279 pp., **7s. 6d.** net.

THE PRINCIPLES AND PRACTICE OF COMMERCIAL ARITHMETIC. By P. W. Norris, M.A., B.Sc. (Hons.). In demy 8vo, 452 pp., **7s. 6d.** net.

MODERN BUSINESS AND ITS METHODS. A Manual of Business Organization, Management and Office Procedure for Commercial Students and Business Men. By W. Campbell, *Chartered Secretary.* In crown 8vo, cloth, 423 pp., **6s.** net. Also in 2 vols., each **3s. 6d.** net.

INSURANCE

INSURANCE. A Practical Exposition for the Student and Business Man. By T. E. Young, B.A., F.R.A.S. With a Practical Section on Workmen's Compensation Insurance, by W. R. Strong, F.I.A.; and the National Insurance Scheme, by Vyvyan Marr, F.F.A., F.I.A. Third Edition. Revised and Enlarged. In demy 8vo, cloth gilt, 440 pp., **10s. 6d.** net.

INSURANCE OFFICE ORGANISATION, MANAGEMENT, AND ACCOUNTS. By T. E. Young, B.A., F.R.A.S., and Richard Masters, A.C.A. Second Edition, Revised. In demy 8vo, cloth gilt, 150 pp., **5s.** net.

ORGANISATION AND MANAGEMENT

OFFICE ORGANISATION AND MANAGEMENT. Including Secretarial Work. By Lawrence R. Dicksee, M.Com., F.C.A., and H. E. Blain, *Late Tramways Manager, County Borough of West Ham.* Fourth Edition. In demy 8vo, cloth gilt, 314 pp., **7s. 6d.** net.

COUNTING HOUSE AND FACTORY ORGANISATION. A Practical Manual of Modern Methods applied to the Counting House and Factory. By J. Gilmour Williamson. In demy 8vo, cloth gilt, 182 pp., **6s.** net.

FILING SYSTEMS. Their Principles and their Application to Modern Office Requirements. By Edward A. Cope. In crown 8vo, cloth gilt, 200 pp. with illustrations, **2s. 6d.** net.

INDUSTRIAL TRAFFIC MANAGEMENT. By Geo. B. Lissenden, *Author of "Railway (Rebates) Case Law," etc., etc.* With a Foreword by Charles E. Musgrave, *Secretary, London Chamber of Commerce.* In demy 8vo, cloth gilt, 260 pp., **7s. 6d.** net.

THE PSYCHOLOGY OF MANAGEMENT. By L. M. GILBRETH. In demy 8vo, 354 pp., 7s. 6d. net.

EMPLOYMENT MANAGEMENT. Compiled and edited by DANIEL BLOOMFIELD. In demy 8vo, 507 pp., 8s. 6d. net.

MUNICIPAL OFFICE ORGANISATION AND MANAGEMENT. Edited by WILLIAM BATESON, A.C.A., F.S.A.A. With contributions by eminent authorities on Municipal Work and Practice. In crown 4to, half-leather gilt, with about 250 diagrams and forms, 503 pp., 25s. net.

CLUBS AND THEIR MANAGEMENT. By FRANCIS W. PIXLEY, F.C.A., *Barrister-at-Law*. In demy 8vo, cloth gilt, 240 pp., 7s. 6d. net.

SOLICITOR'S OFFICE ORGANISATION, MANAGEMENT, AND ACCOUNTS. By E. A. COPE and H. W. H. ROBINS. In demy 8vo, cloth gilt, 176 pp., with numerous forms, 5s. net.

COLLIERY OFFICE ORGANISATION AND ACCOUNTS. By J. W. INNES, F.C.A., and T. COLIN CAMPBELL, F.C.I. In demy 8vo, 6s. net.

DRAPERY BUSINESS ORGANISATION AND MANAGEMENT. By J. ERNEST BAYLEY. In demy 8vo, cloth gilt, 300 pp., 6s. net.

GROCERY BUSINESS ORGANISATION AND MANAGEMENT. By C. L. T. BEECHING. With Chapters on Buying a Business, Grocers' Office Work and Book-keeping, etc., by J. A. SMART. Second Edition. In demy 8vo, cloth, 160 pp., 6s. net.

SHIPPING OFFICE ORGANISATION, MANAGEMENT, AND ACCOUNTS. *(see below)*.

BANK ORGANISATION, MANAGEMENT AND ACCOUNTS (p. 4).

INSURANCE OFFICE ORGANISATION (p. 2).

THE HISTORY, LAW, AND PRACTICE OF THE STOCK EXCHANGE. By A. P. POLEY, B.A., *Barrister-at-Law*; and F. H. CARRUTHERS GOULD. Second Edition, revised. In demy 8vo, cloth gilt, 348 pp., 6s. net.

SHIPPING

SHIPPING OFFICE ORGANISATION, MANAGEMENT, AND ACCOUNTS. A comprehensive Guide to the innumerable details connected with the Shipping Trade. By ALFRED CALVERT. In demy 8vo, cloth gilt, 203 pp., with numerous forms, 6s. net.

THE EXPORTER'S HANDBOOK AND GLOSSARY. By F. M. DUDENEY. Foreword by W. EGLINGTON, *Founder and Editor of "The British Export Gazette."* In demy 8vo, cloth gilt, 254 pp. 6s. net.

THE PRINCIPLES OF MARINE LAW. (*See* p. 7.)

CASE AND FREIGHT COSTS. The Principles of Calculation relating to the Cost of, and Freight on, Sea or Commercial Cases. By A. W. E. CROSFIELD. In crown 8vo, cloth, 62 pp., 2s. net.

BANKING AND FINANCE

MONEY, EXCHANGE AND BANKING, in their Practical, Theoretical, and Legal Aspects. A complete Manual for Bank Officials, Business Men, and Students of Commerce. By H. T. EASTON, *Associate of the Institute of Bankers*. Second Edition, Revised. In demy 8vo, cloth gilt, 312 pp., 6s. net.

FOREIGN EXCHANGE AND FOREIGN BILLS IN THEORY AND IN PRACTICE. By W. F. SPALDING, *Certificated Associate, Institute of Bankers, etc., etc.* In demy 8vo, cloth gilt, 227 pp., 7s. 6d. net.

EASTERN EXCHANGE, CURRENCY AND FINANCE. By the same Author. Second Edition. In demy 8vo, cloth, 375 pp., with 1 coloured and 6 black-and-white full-page plates, **12s. 6d.** net.

FOREIGN EXCHANGE, A PRIMER OF. By the same Author. In crown 8vo, cloth, 108 pp., **3s. 6d.** net.

PRACTICAL BANKING. By J. F. G. SAGSHAW, *Certificated Associate of the Institute of Bankers*. With chapters on **"The Principles of Currency,"** by C. F. HANNAFORD, *Associate of the Institute of Bankers*, and **"Bank Book-keeping,"** by W. H. PEARD, *Member of the Institute of Bankers in Ireland*. In demy 8vo, cloth gilt, 397 pp., **6s.** net.

BANK ORGANISATION, MANAGEMENT, AND ACCOUNTS. By J. F. DAVIS, D.Lit., M.A., LL.B. (Lond.). In demy 8vo, cloth gilt, 165 pp., **5s.** net

BILLS, CHEQUES, AND NOTES. A Handbook for Business Men and Lawyers. Together with the Bills of Exchange Act, 1882, and the Amending Act, Bills of Exchange (Crossed Cheques) Act, 1906. By J. A. SLATER, B.A., LL.B. (Lond.), *Barrister-at-Law*. Third Edition. In demy 8vo, cloth gilt, 214 pp., **6s.** net.

BANKERS' SECURITIES AGAINST ADVANCES. By LAWRENCE A. FOGG, *Certificated Associate of the Institute of Bankers*. In demy 8vo, cloth gilt, 120 pp. **5s.** net.

BANKERS' ADVANCES. By F. R. STEAD. Edited by SIR JOHN PAGET, K.C. In demy 8vo, cloth., 120 pp., **6s.** net.

THE EVOLUTION OF THE MONEY MARKET (1385-1915). An Historical and Analytical Study of the Rise and Development of Finance as a Centralised, Co-ordinated Force. By ELLIS T. POWELL, LL.B. (Lond.), D.Sc. (Econ., Lond.), *Barrister-at-Law*. In demy 8vo, cloth gilt, 748 pp., **10s. 6d.** net.

SIMPLE INTEREST TABLES. By WM. SCHOOLING, C.B.E. In crown 8vo, cloth gilt, 188 pp., **21s.** net.

TALKS ON BANKING TO BANK CLERKS. By HAROLD E. EVANS, *Certificated Associate of the Institute of Bankers*. In crown 8vo, cloth, 152 pp., **2s. 6d.** net.

DICTIONARY OF BANKING. A Complete Encyclopaedia of Banking Law and Practice. By W. THOMSON, *Bank Inspector*. Third Edition, Revised and Enlarged 1919. In crown 4to, half leather gilt, 642 pp., **30s.** net.

SECRETARIAL WORK

THE COMPANY SECRETARY'S VADE MECUM. Edited by PHILIP TOVEY, F.C.I.S. In foolscap 8vo, cloth, **2s.** net.

SECRETARY'S HANDBOOK. A Practical Guide to the Work and Duties in connection with the Position of Secretary to a Member of Parliament, a Country Gentleman with a landed estate, a Charitable Institution, with a section devoted to the work of a Lady Secretary and a chapter dealing with Secretarial work in general. Edited by H. E. BLAIN. In demy 8vo, cloth gilt, 168 pp., **5s.** net.

GUIDE FOR THE COMPANY SECRETARY. A Practical Manual and Work of Reference for the Company Secretary. By ARTHUR COLES, F.C.I.S. Second Edition, Enlarged and thoroughly Revised. With 75 facsimile forms, and the full text of the Companies Acts, 1908 and 1913, and the Companies Clauses Act, 1845. In demy 8vo, cloth gilt, 432 pp., **6s.** net.

COMPANY ACCOUNTS. By the same Author. (See p. 1.)

DICTIONARY OF SECRETARIAL LAW AND PRACTICE. A Comprehensive Encyclopaedia of Information and Direction on all matters connected with the work of a Company Secretary. Fully illustrated with the necessary forms and documents. With Sections on special branches of Secretarial Work. Edited by PHILIP TOVEY, F.C.I.S. With contributions by nearly 40 eminent authorities on Company Law and Secretarial Practice, including: The Rt. Hon. G. N. Barnes, M.P.; F. Gore-Browne K.C., M.A.; A. Crew, F.C.I.S.; J. P. Earnshaw, F.C.I.S.; M. Webster Jenkioson, F.C.A.; F. W. Pixley, F.C.A. Third Edition, enlarged and revised. In one handsome volume, half leather gilt, gilt top, 1011 pp., **35s.** net.

THE TRANSFER OF STOCKS, SHARES, AND OTHER MARKETABLE SECURITIES. A Manual of the Law and Practice. By F. D. HEAD, B.A. (Oxon.), *Barrister-at-Law.* Second Edition, Revised and Enlarged. In demy 8vo, cloth gilt, 220 pp., **5s.** net.

THE CHAIRMAN'S MANUAL. Being a guide to the management of meetings in general, and of meetings of local authorities, with separate and complete treatment of the meetiogs of public companies. By GURDON PALIN, *Barrister-at-Law*, and ERNEST MARTIN, F.C.I.S. In crown 8vo, cloth gilt, 192 pp., **3s. 6d.** net.

HOW TO TAKE MINUTES. Edited by ERNEST MARTIN, F.C.I.S. In demy 8vo, cloth gilt, 130 pp., **2s. 6d.** net.

WHAT IS THE VALUE OF A SHARE? Tables for readily and correctly ascertaining (1) the present value of shares; and (2) what dividends should be paid annually to justify the purchase or market price of shares. By D. W. ROSSITER. In demy 8vo, limp cloth. 20 pp., **2s. 6d.** net.

PROSPECTUSES: HOW TO READ AND UNDERSTAND THEM. By PHILIP TOVEY, F.C.I.S. In demy 8vo, cloth, 109 pp., **2s. 6d.** net.

INCOME TAX

INCOME TAX AND SUPER-TAX PRACTICE. Iocluding a Dictionary of Income Tax and Specimen Returns, incorporating the Consolidation Act of 1918. Third Edition, Revised and Enlarged. By W. E. SNELLING. In demy 8vo, cloth gilt, 450 pp., **15s.** net.

INCOME TAX AND SUPER-TAX LAW AND CASES, including the Finance Act, 1918. A Practical Exposition of the Law, for the use of Income Tax Officials, Solicitors, Accountants, etc. Third Edition, Revised. By W. E. SNELLING. In demy 8vo, cloth gilt, 432 pp., **12s. 6d.** net.

COAL MINES EXCESS PAYMENTS, Guarantee Payments and Levies for Closed Mines. This book deals with the Agreement entered into between the Coal Controller and the colliery owners. By W. E. SNELLING. Demy 8vo, cloth gilt, 176 pp., **12s. 6d.** net.

EXCESS PROFITS (Including Excess Mineral Rights), DUTY, and Levies under the Munitions of War Acts. Incorporating the Provisions of the Income Tax Acts made applicable by Statute and by Regulation, the provisions of the Finance Act, 1919, and also the Regulations of the Commissioners of Inland Revenue, and of the Minister of Munitions. By W. E. SNELLING. Fifth Edition, Revised and Enlarged. In demy 8vo, cloth gilt, 458 pp. **15s.** net.

ECONOMICS

ECONOMIC GEOGRAPHY. By J. MCFARLANE, M.A., M.Com. In demy 8vo, cloth gilt, 568 pp., with 18 illustrations, **8s. 6d.** net.

OUTLINES OF THE ECONOMIC HISTORY OF ENGLAND. A Study in Social Development. By H. O. MEREDITH, M.A., M.Com., *Fellow of King's College, Cambridge.* In demy 8vo, cloth gilt, 376 pp., **6s.** net.

THE HISTORY AND ECONOMICS OF TRANSPORT. By ADAM W. KIRKALDY, M.A., B.Litt., Oxford; M.Com., Birmingham; and ALFRED DUDLEY EVANS. In demy 8vo, cloth gilt, 348 pp., **7s. 6d.** net.

THE ECONOMICS OF TELEGRAPHS AND TELEPHONES. By JOHN LEE, M.A., *Traffic Manager, Post Office Telegraphs.* In crown 8vo, cloth gilt, 92 pp., **2s. 6d.** net.

INDUSTRY AND FINANCE. (Supplementary Volume.) Edited by ADAM W. KIRKALDY, M.A., B.Litt., M.Com. Dealing with the results of inquiries arranged by the Section of Economic Science and Statistics of the British Association, and bringing the information as to the replacement of men by women in industry, and that regarding currency, finance, banking, etc., up to date. In demy 8vo, cloth, **5s.** net.

ADVERTISING AND SALESMANSHIP

THE CRAFT OF SILENT SALESMANSHIP. A Guide to Advertisement Construction. By C. MAXWELL TREGURTHA and J. W. FRINGS. Size, 6½ in. by 9½ in., cloth, 98 pp., with illustrations. **5s.** net.

THE NEW BUSINESS. A Handbook dealing with the Principles of Advertising, Selling, and Marketing. By HARRY TIPPER, *President, Advertising Men's League, New York.* In demy 8vo, cloth gilt, 406 pp., **8s. 6d.** net.

SALESMANSHIP. By W. A. CORBION and G. E. GRIMSDALE. In crown 8vo, cloth, 186 pp., **2s. 6d.** net.

COMMERCIAL TRAVELLING. By ALBERT E. BULL. In crown 8vo, cloth gilt, 174 pp., **3s. 6d.** net.

THEORY AND PRACTICE OF ADVERTISING. By W. DILL SCOTT, PH.D. In large crown 8vo, cloth, with 61 illustrations, 240 pp., **7s. 6d.** net.

THE PSYCHOLOGY OF ADVERTISING. By the same Author. In large crown 8vo, cloth, with 67 illustrations, 282 pp., **7s. 6d.** net.

ADVERTISING AS A BUSINESS FORCE. By P. T. CHERINGTON. In demy 8vo, cloth, 586 pp., **7s. 6d.** net.

THE PRINCIPLES OF ADVERTISING ARRANGEMENT. By F. A. PARSONS, Cloth, 128 pp., illustrated, **7s. 6d.** net.

HOW TO ADVERTISE. By G. FRENCH, *Editor of the "Advertising News."* In crown 8vo., **8s. 6d.** net.

THE MANUAL OF SUCCESSFUL STOREKEEPING. By W. A. HOTCHKIN. In demy 8vo, 298 pp., **8s. 6d.** net.

ADS. AND SALES. By HERBERT N. CASSON. In demy 8vo, cloth, 167 pp., **7s. 6d.** net.

THE PRINCIPLES OF PRACTICAL PUBLICITY. By TRUMAN A. DE WEESE. In large crown 8vo, cloth, with 43 illustrations, 269 pp., **7s. 6d.** net.

PRACTICAL SALESMANSHIP. By N. C. FOWLER, Junr. In crown 8vo, 337 pp., **5s.** net.

LAW

MERCANTILE LAW. By J. A. SLATER, B.A., LL.B. A practical exposition for Law Students, Business Men, and Advanced Classes in Commercial Colleges and Schools. Fourth Edition. In demy 8vo, cloth gilt, 464 pp., **7s. 6d.** net.

COMPANIES AND COMPANY LAW. Together with the Companies (Consolidation) Act, 1908, and the Act of 1913. By A. C. CONNELL, LL.B. (Lond.), *of the Middle Temple, Barrister-at-Law.* Second Edition, Revised. In demy 8vo, cloth gilt, 348 pp., **6s.** net.

COMPANY CASE LAW. By F. D. HEAD, B.A. (Oxon.), *Barrister-at-Law.* In demy 8vo, cloth gilt, 314 pp., **7s. 6d.** net.

THE LAW OF CARRIAGE. By J. E. R. STEPHENS, B.A., *of the Middle Temple, Barrister-at-Law.* In demy 8vo, cloth gilt, 340 pp., **5s.** net.

THE LAW RELATING TO THE CARRIAGE BY LAND OF PASSENGERS, ANIMALS, AND GOODS. By S. W. CLARKE, *Barrister-at-Law.* In demy 8vo, cloth gilt, 350 pp., **7s. 6d.** net.

INCOME TAX AND SUPER-TAX LAW AND CASES. (See p. 5.)

THE LAW RELATING TO SECRET COMMISSIONS AND BRIBES (CHRISTMAS BOXES, GRATUITIES, TIPS, ETC.); THE PREVENTION OF CORRUPTION ACT, 1906. By ALBERT CREW, *Barrister-at-Law; Lee Prizeman of Gray's Inn.* In demy 8vo, cloth gilt, 198 pp., **5s.** net.

BANKRUPTCY, DEEDS OF ARRANGEMENT, AND BILLS OF SALE. By W. VALENTINE BALL, M.A., and G. MILLS, B.A., *Barristers-at-Law.* Third Edition. Revised in accordance with the Bankruptcy and the Deeds of Arrangement Acts, 1914. In demy 8vo, 364 pp., **5s.** net.

PRINCIPLES OF MARINE LAW. By LAWRENCE DUCKWORTH, *Barrister-at-Law.* Third Edition, Revised. In demy 8vo, about 400 pp., **7s. 6d.** net.

GUIDE TO THE LAW OF LICENSING. The Handbook for all Licence-holders. By J. WELLS THATCHER, *Barrister-at-Law.* In demy 8vo, cloth gilt, 200 pp., **5s.** net.

RAILWAY (REBATES) CASE LAW. By GEO. B. LISSENDEN. In demy 8vo, cloth gilt. 450 pp., **10s. 6d.** net.

THE LAW RELATING TO THE CHILD: Its Protection, Education, and Employment. With Introduction on the Laws of Spain, Germany, France, and Italy; and Bibliography. By ROBERT W. HOLLAND, M.A., M.Sc., LL.D., *Barrister-at-Law.* In demy 8vo, 166 pp., **5s.** net.

GUIDE TO THE REGISTRATION OF BUSINESS NAMES ACT, 1916. By KENNETH BROWN, *Solicitor.* In crown 8vo, paper boards, **1s.** net.

CONVEYANCING. By E. A. COPE. In crown 8vo, cloth, 206 pp., **3s. 6d.** net.

WILLS, EXECUTORS, AND TRUSTEES. By J. A. SLATER, B.A., LL.B. With a chapter on Intestacy. In foolscap 8vo, cloth, 122 pp., **1s. 6d.** net.

INHABITED HOUSE DUTY. By W. E. SNELLING. In demy 8vo, cloth gilt, 356 pp., **12s. 6d.** net.

THE LAW OF REPAIRS AND DILAPIDATIONS. By A. CATO WORSFOLD, M.A., LL.D. In crown 8vo, cloth gilt, 104 pp., **3s. 6d.** net.

THE LAW OF EVIDENCE. By W. NEMBHARD HIBBERT, LL.D. *Barrister-at-Law.* Second Edition, Revised. In crown 8vo, 144 pp., **5s.** net.

THE LAW OF PROCEDURE. By the same Author. In demy 8vo, cloth gilt, 122 pp., 5s. net.

BILLS, CHEQUES, AND NOTES. (See page 4.)

THE HISTORY, LAW, AND PRACTICE OF THE STOCK EXCHANGE. (See page 3.)

BUSINESS REFERENCE BOOKS

COMMERCIAL ENCYCLOPAEDIA AND DICTIONARY OF BUSINESS. A reliable and comprehensive work of reference on all commercial subjects, specially designed and written for the busy merchant, the commercial student, and the modern man of affairs. Edited by J. A. SLATER, B.A.,

LL.B. (Lond.), *of the Middle Temple and North-Eastern Circuit, Barrister-at-Law.* Assisted by upwards of 50 specialists as contributors. With numerous maps, illustrations, facsimile business forms and legal documents, diagrams, etc. In 4 vols., large crown 4to (each 450 pp.), cloth gilt, £2 net. Half-leather gilt, £2 12s. 6d. net.

BUSINESS MAN'S GUIDE. Seventh Revised Edition. With French, German, Spanish and Italian equivalents for the Commercial Words and Terms. Edited by J. A. SLATER, B.A., LL.B. (Lond.). The work includes over 2,000 articles. In crown 8vo, cloth, 520 pp., 5s. net.

DICTIONARY OF COMMERCIAL CORRESPONDENCE IN SEVEN LANGUAGES — ENGLISH, FRENCH, GERMAN, SPANISH, ITALIAN, PORTUGUESE AND RUSSIAN. In demy 8vo, cloth, 502 pp., 10s. 6d. net.

FILING SYSTEMS. (See page 2.)

SIMPLE INTEREST TABLES. (See page 4.)

A MANUAL OF DUPLICATING METHODS. By W. DESBOROUGH. In demy 8vo, cloth, 90 pp., illustrated, 2s. net.

COMMON COMMODITIES AND INDUSTRIES SERIES. Each book in crown 8vo, cloth, illustrated, 2s. 6d. net. Volumes already published on Tea, Coffee, Sugar, Oils, Wheat, Rubber, Iron and Steel, Copper, Coal, Timber, Cotton, Silk, Wool, Linen, Tobacco, Leather, Clays, Paper, Soap, Glass, Gums and Resins, The Motor Industry, Boot and Shoe Industry, Gas and Gas Making, Petroleum, Salt, Furniture, Coal Tar, Knitted Fabrics, Zinc, Asbestos, Photography, Silver, Carpets, Paints and Varnishes, Cordage and Cordage Hemp and Fibres, Acids and Alkalis, Gold, Electricity, Butter and Cheese, Aluminium.

INDEX

Printed by Sir Isaac Pitman & Sons, Ltd., Bath, England
V—(1779)

CONTENTS

BANKERS' ADVANCES

CHAPTER I

INTRODUCTORY

BANKERS are dealers in money, or rather, in rights expressed in terms of money. They act as intermediaries between lenders and borrowers in the mobilization of floating capital.

Those two thousand millions of deposits lodged with the banks of the United Kingdom, how are they represented? Although repayable in legal tender, only a comparatively small portion is held by the banks in this form. The greater portion exists in the form of liquid capital loaned to borrowers. When the deposits and loans of the banks increase it means that there is so much more business being conducted on borrowed capital.

"To facilitate the transfer of the use of capital on the banking market it is first converted by bankers into a more marketable form." (H. S. Foxwell on the "Social Aspect of Banking.")[1]

Much of the floating capital of the country may, in a certain sense, be regarded as pooled. If a man sells £10,000 worth of goods to a solvent buyer, on credit, he parts with the goods in exchange for a £10,000 interest in the pool. He loses his hold on the particular goods in exchange for a right to £10,000 worth of pooled capital. These rights to money's worth, these interests in the pool, are the things that banks deal in.

But it would be well, perhaps, to pursue inquiry in this direction a little further. And first as to the nature of credit.

[1] *Vide, Journal of the Institute of Bankers* for February, 1886.

Bagehot defines credit merely as "the disposition of one person to trust another." Through its agency there is not, directly, any increase in the capital of a country; though, by means of credit, the circulation of capital is facilitated.

Suppose A sells goods to B, taking his acceptance in exchange, which he transfers to C in exchange for goods of like value. Something very like barter would have resulted. A series of transactions would have been effected by A without the intervention of any cash, but wholly through the agency of credit. Again, C might pass on the same bill to D, in consideration for other goods; and, just conceivably, D might re-deliver it to B, in settlement of yet another trade transaction, when, of course, all indebtedness would be extinguished.

Conceive of the establishment of the first bank in a country. Members of the community would presently place their cash, which, it may be supposed, they had hitherto hoarded, in its care. Against the credits thus created they would draw cheques, and would receive cheques from other persons. By the simple process of transfer in the bank's books, payments might be effected without the cash in its hands decreasing. In that case the bank would soon realize that it had more actual cash in its till than it was ever likely to require. It would then begin to make advances, at interest, to persons anxious to borrow. The country at large would benefit from the economy exercised in the use of cash. Nevertheless, inasmuch as its deposits would be repayable in cash, the bank would be constrained to maintain a certain proportion of its liabilities in cash, in order to be in a position to meet all probable demands.

Now, although the power of banks to grant loans is limited, it does not follow they are unable to do so without the intervention of cash. Suppose a bank agrees to an advance to A, who, accordingly, draws a cheque in favour of B, which B deposits with the same bank. The banks

total of deposits would be increased to a like extent as would its total of loans. All the banks may be advancing and receiving deposits evenly at one and the same time. (The interchange effected through the machinery of the Clearing House resolves the payment of most of the cheques drawn on our banks into a mere system of book-entries.) The actual reserves of the banks would remain unaltered. So the process might continue, but only so far as the recognized proportion of cash, or its equivalent, to liabilities was maintained.

The effect of all this lending and depositing would be that there would be so much more business done on borrowed capital. As has been said, bankers do not actually create capital, but facilitate its circulation. It may be the same capital, but under different control. Through the agency of the banks capital is brought into play that, otherwise, would remain outside the pale of commerce and industry; and this, of course, has a stimulating effect all round. Bagehot describes banks as "solvency meters." They lend out their deposits to those requiring the use of working capital, charging enhanced interest rates by way of remuneration; but, at the same time, they accept all responsibility for losses that may arise in connection with such advances.

An increase in the deposits and loans of the banks, then, might represent merely a change in the control of certain liquid capital. What were the causes of the enormous increase in deposits during the war? The rise in prices, no doubt, partially contributed thereto,[1] as did also the large security realizations, and the withdrawal of capital from many ordinary channels of trade. But, in no small degree, it was due to the huge turnovers in connection with all sorts of Government contracts, which were generally of a lucrative character. What happened was this. The

[1] The writer is of opinion that exaggerated views are held as to the effect of currency note issues on prices. Their aggregate circulation is small compared with that of cheques. To some extent they have merely replaced gold.

Government borrowed from time to time large sums from the Bank of England on Ways and Means Account. These were distributed amongst their creditors, whose balances with the different banks were thereby more or less swollen. The banks then lent back to the Government on Treasury bills and in other ways. The money was thus available for further payments to Government creditors, involving a fresh augmentation of the deposits with the banks; and so the process continued. It is difficult to see how the wealth of the country, taken collectively, could have been increased thereby. We know, indeed, that through the waste of war, the country was growing poorer. Meantime it was absorbing enormous war issues. These were taken up by investors, who so far became the creditors of the general body. Nor did this process involve any increase in the country's wealth. But, all the while, the Government were getting control of the assets and labour requisite for the successful waging of the war. It comes back to that. Finance stands for control of capital and direction of enterprise, as expressed in terms of money.

As the whole of its deposits are repayable on demand, or at short notice, it would clearly be impolitic for a bank to lock up its resources in permanent form. The history of English banking demonstrates the truth of this. All our classical writers on the subject, no less than the leading authorities of the day, insist hereon. A bank cannot supply the fixed capital, and can provide a part only of the circulating capital of a trader. It is a bank's province to make only temporary advances; that is, advances for current business purposes. To advance in the form of permanent, or "dead," loan is held to be contrary to all the principles of our banking system. A bank should not undertake the business of a building society or loan office. And, again, no customer should have more than his proper share of the bank's money. As well as being elastic in character, an advance should be within due proportion to the business and turnover of a customer. All advances

should involve frequent and regular operations on the relative accounts. A large, sticky advance, without a corresponding turnover, is simply an abomination to any self-respecting banker.

As Bagehot tells us in *Lombard Street*, there is inculcated in every trained banker's mind "a wise apprehensiveness." Credit is susceptible to many influences, as, for example, over-production; excessive investment in speculative securities, home or foreign; failure in the world's harvests; disorganization of the monetary system of a foreign country; the sudden unlooked-for failure of a great and trusted house; political unquiet; a fear of invasion; or an actual declaration of war. "The disposition of people to trust one another" may at any time receive a rude shock, and a banker has to be prepared for all emergencies. In evil days he has to see to it that no restrictions are put upon the legitimate facilities usually afforded his regular customers. To assure this, his assets must be liquid. It is not sufficient that he should have liquid assets sufficient to enable him just to scrape along. There must be a margin, and a very ample margin, beyond what may be required to meet all eventualities. Like Caesar's wife, he must be above suspicion. If he has locked up any considerable portion of his resources in permanent loans of an unrealizable character, the fact will be sufficiently well known, and, in times of difficulty, he will certainly be marked down for suspicion.

Consider the great power for good or evil placed in the hands of our great bankers. To them the community has entrusted, very largely, the care of its savings and surplus funds. The country reposes in them the utmost confidence; and it is universally admitted that they are skilful and faithful guardians. As controllers of vast capital they learn to take long views. Broadly speaking, they see to it that capital is made to circulate to the general advantage, and they discourage diversions into channels indicative of waste. What, for instance, can be the use of attempting

to bolster up decaying industries, the productions of which can obviously be better supplied to us by other countries, and are in no sense vital to our own? Misdirected labour is a crying evil. The proper direction of labour is one of the great problems of the day. It means the curtailment of waste; the advancement of the all-round standard of comfort; the general well-being of the community. That is one of the arguments, and a very potent argument, for the absorption of the smaller banks. They were liable, from their very environment, to think and act parochially. The large banks think and act imperially. As a writer in *The Banker's Magazine* expressed it some few years since: "Banking has ceased to be patriarchal and has become scientific."[1]

[1] *Vide, Centralization of Banking*, September, 1910.

CHAPTER II

DISCOUNT ACCOMMODATION

MR. HARTLEY WITHERS says in *Money-Changing*: "The bill of exchange is the most wonderful and magical instrument of credit that has ever helped to turn the wheels of trade and join all the nations together into a great commercial community with common interests, etc."

Devised, originally, as instruments of exchange between different countries, bills of exchange are utilized for this purpose to an enormous extent at the present day. The invention is one of great antiquity. They were certainly in common use, and were fully recognized by the law merchant throughout Europe, during the Middle Ages. Gilbart mentions in his well-known treatise, *The Practice of Banking*, that they were said to have been invented by the Jews or Lombards, for the purpose of withdrawing their property from the countries from which they were expelled (about the twelfth century); but, as Macleod points out in his *Theory and Practice of Banking*, Cicero speaks of them as being in common use in his time (that is, nearly a century B.C.), and they were probably so long ere then.

In comparatively recent times bills have also come to be used in connection with inland trade. Such bills bear little relation to exchange in its broader and generally accepted sense. They are of the class that a banker is in the habit of discounting for his regular customers, and it is of these it is proposed to treat in the present chapter, deferring consideration of the international bill, and of the business of the bill-broker, to the concluding chapter.

In the earlier history of banking in this country, lending appears to have been almost entirely by way of discounting; but during the last five or six decades there has been a marked tendency for loans to increase in proportion to

discounts. Relatively there are not nearly so many inland bills drawn now as formerly. No doubt the extension of the limited liability principle to trading concerns has been one of the chief causes of this. Another is to be found in the long-continued cheapness of money that prevailed some years back, which led to the introduction of the method of cash payments under trade discounts. In many trades, settlement by cheque in fourteen days, or a month prompt, became the rule, where formerly bills at from three to six months had been taken. From the banker's point of view this has been rather a subject for regret. And this will be readily understood. When a bill is discounted the period of the advance is definite. With a well-packed bill-case the old-time banker felt in an assured position, for the reason that, in the event of pressure, he could always replenish his till by the simple process of letting the bills run off and contracting his discounts. Moreover, the better class of short-dated paper (two or three months), if accepted payable in London, lent itself to re-discount. It was never the practice of London banks, however, to re-discount their bills. In this connection it may be observed that a banker always preferred to hold a preponderance of short-dated over six months' bills, the discounting of the latter partaking too much of the nature of a permanent advance; although in taking the longer-dated bills he gets a slight pull as regards interest. In effect he gets interest on interest in respect of the later months.

When a banker discounts a bill he is practically lending on the security thereof. The property in the bill passes, but there is a right of recourse against the customer under his indorsement, or by agreement or custom.[1] It is a sale

[1] *Vide, The Law of Banking*, by Heber Hart.

Sir John Paget comments as follows: "I have always doubted whether a banker has any recourse against his customer on a bill or cheque he has discounted or taken for value except on the indorsement or by special agreement. The contrary view is held by Chalmers, and apparently by Hart, and it receives some support from a dictum of Lord Lindley in the Gordon case, 1903,

by way of discount. When a foreign bill is acquired for purpose of remittance it is always spoken of as being bought or sold.

A trade bill of exchange is, in itself, simply an instrument of credit. It is no more than an undertaking to pay a certain sum on a specific date; the acceptor risking his commercial reputation that the liability will be duly discharged at maturity. As against this liability he has the relative goods to trade away.

Take the case of a wholesale dealer or manufacturer who is under obligations on his acceptances for goods supplied by merchants. He has not bought the goods to hold indefinitely, but to dispose of at a profit, either in the same form or as manufactured articles. It is competent to him also to sell on credit, drawing in turn upon his customers, the retail dealers. There are now two sets of bills running against the same goods. It is conceivable there may be more; but this example will suffice by way of illustration. Let it be assumed that these two sets of bills are discounted with the bankers, respectively of the merchant and the wholesale dealer or manufacturer. The original acceptors have parted with the goods whilst still under liability to the merchants. But, *per contra*, they will have taken the acceptances of the retail dealers whose ability to meet the same has been rendered so far assured by reason of their right of disposal over the goods they have acquired. Thus it will be seen that, in a general sense, the goods have constituted a sort of assurance for the payment of both sets of bills. There is certainly no specific assurance for the payment of any of the bills, yet, with regard to each set, there is a fair presumption that the respective acceptors have been placed in a comfortable position to meet them.

A.C., at p. 248; though I do not believe the doctrine has ever been applied to bills as distinguished from cheques, and a custom relating to cheques would not necessarily include bills. It has been held that a general agreement in writing as to bills discounted may have the same effect in this respect as the indorsement of the several bills."

This consideration is an important factor when estimating any risk the bankers may have incurred in discounting the bills, on every one of which, be it observed, there are at least two parties liable to them. It will be apparent that the security afforded by genuine trade bills is something tangible and real. It is for this reason, no doubt, such bills have been termed "real bills." It will be recognized then that, from the point of view of security, as well as from those of short credit and direct trade facility, the discounting of this class of paper is a perfectly legitimate branch of banking business.

But all bills do not represent genuine trade transactions, and herein lies a difficulty.

Hankey, in his little volume on *Banking*, relates how he was once told that there was nothing easier to conduct than the business of a banker if he would only learn the difference between a mortgage and a bill of exchange; and, as he goes on to demonstrate, there is a good deal of truth underlying the statement. Bills should be founded only on circulating capital, not on fixed capital; at all events, such bills as are usually tendered to a banker by his customers for discount. Bills cannot be met out of fixed capital. It is only a short step from bills founded on fixed capital to out-and-out accommodation paper.

Accommodation bills, otherwise called *wind-bills* or *kites*, unlike real bills, are not founded on genuine trade transactions, but are fictitiously created amongst traders, without any real consideration passing, and often with the intention to deceive. The usual *modus operandi* is for the drawer to get some friend of good standing to accept, though sometimes the accommodating party himself draws or indorses the bill. It may be that the drawer, being short of capital, is desirous of raising the wherewithal to launch himself upon some commercial operation, not unlikely of a more or less speculative character. Or he may have gained a good name with his banker, but have met with some financial disaster, the full extent of which he wishes to

conceal. He begins his operations in a small way. He sends in for discount a batch of paper, including some few of these fabricated bills. If no question is raised he may be tempted to extend his field of operations. But when the fabricated bills fall due it is the drawer himself who must make the necessary provision for their payment. On an accommodation bill the drawer is the party really liable[1] (that is, when the accommodating party signs as acceptor), and the acceptor can sue the drawer for whose accommodation he has accepted in case he himself is called upon to pay. So new bills, of similar character, will probably be sent in to replenish the account. The scheme must be detected sooner or later, and fortunate for the banker if in time to escape a more or less severe loss, even by dint of considerable nursing. In the bad old days of English banking this pernicious practice of "kite-flying" was far more prevalent than it is to-day. Bankers have become more cautious. They are more thorough and methodical in their investigations, and especially by way of obtaining periodical confidential opinions of one another respecting the standing and character of acceptors. They recognize more fully their interdependence. For instance, no respectable banker, nowadays, would be guilty of retiring acceptances, payable in other parts of the country, for unknown persons holding themselves out to be the acceptors, especially when asked to do so by drawers. Yet at one time such practices were not unknown; practices that betrayed brother bankers into incurring heavy losses on its ultimately transpiring that acceptors' names to paper they had discounted had been systematically forged over long periods.

"Kite-flying" takes various forms, and there is call for great care and watchfulness on the part of bankers to guard successfully against it.

[1] Sir John Paget comments as follows: "The accommodation acceptor is liable in the first place to the *bonâ fide* holder of the bill. But, having his remedy over, on implied guarantee, against the person for whose accommodation he accepted, he may fairly be termed the person *really* or *ultimately* liable."

Experience shows that firms with good reputations have, at times, succeeded in discounting accommodation paper in different quarters, and, by the exercise of much ingenuity, have evaded suspicion for a considerable while. Especially has it been in times of speculation in the great necessaries of life that the tactics have been indulged in; and, perhaps, more than by others, by persons engaged in the corn trade, who have been tempted to gamble on the chances of a good or indifferent harvest, or upon the extent of importations. They have, not infrequently, resorted to a method of cross-acceptance—"cross-firing," as it is termed. Two or three confederates have drawn on one another for fictitious considerations, hoodwinking their bankers into the belief that the paper represented *bonâ fide* trade transactions. And in such a case it has been held that one of two cross-acceptances is a good consideration for the other; for which reason they are not to be deemed accommodation bills. Nor is the mere creation of accommodation paper illegal in itself, of however doubtful morality it may savour. It is indeed very difficult to decide what constitutes the consideration necessary to take a bill out of the category of accommodation paper. The only safeguards are in the exercise of intelligence and constant vigilance. The careful banker will keep a close eye on all his discounts. He will watch the account of a customer to whom discount accommodation is granted, for acceptances or other payments to parties drawn upon. In this connection it may be observed that "cross-firing" by means of mere cheques is a dodge occasionally attempted by impecunious parties of indifferent character. But that sort of thing should be quickly detected and nipped in the bud. In the case of discounts the mischief may not culminate for some considerable time. To resume. A banker will be on the alert for renewals, betokening a weakening in the position of acceptors, if not actual accommodation. He will see that bills are not discounted regularly a few days before others, on the same drawees, and for somewhat uniform amounts,

fall due. He will beware of bills drawn on acceptors whose lines of business are altogether dissimilar from that of the customer. At the same time, he will satisfy himself that his own customer's acceptances passing through the account are all in proper character; that is to say, that the customer is not accepting outside the bounds of his legitimate business. He will also note what paper he discounts accepted by customers of his own enjoying discount facilities. These bills may be legitimate enough, but they constitute an addition to the total liabilities of those customers to the banker. Finally, there will be bills occasionally presented for discount that he cannot "read." They may be susceptible of satisfactory explanation; or they may be merely "pig on pork"—one friend obliging another. Such paper will no doubt be thrown out pending the result of full inquiries.

It is important to bear in mind that, when a banker has discounted bills for a customer, he has no lien, in respect of such discounts, on any credit balance on the account during their currency. "Such a lien would be contrary to the object of the advance." (*Bowen* v. *Foreign and Colonial Gas Co.*, 1874.) (The law of "set-off" is different in bankruptcy.) Nor can he sue on a discounted bill until after dishonour. If a bill or promissory note, however, has not been discounted, but is simply held as security, "there is nothing in law to prevent a banker suing for the overdraft during the currency of the note or bill."[1]

[1] *Vide, The Law of Banking*, by Sir John Paget.

CHAPTER III

ADVANCES AGAINST MARKETABLE SECURITIES

GOOD Stock Exchange securities, showing a sufficient margin, may usually be regarded as eligible banking cover.

If business people, or concerns, require temporary accommodation, and have assets available answering to the above description, these holdings provide, in some ways, an ideal form of security for the purpose. They constitute a convenient form of security, too, by way of support to a guarantee, or otherwise to be held collaterally. They can be dealt with with the minimum outlay of time, trouble, and expense; and, when the relative liability is discharged, they can be as easily released. Again, it is considered quite proper to make temporary advances thereon to persons or institutions whose regular course of business it is to deal largely in stocks and shares. And, before the war, the practice had obtained for stock-brokers to pledge such securities against loans raised for the purpose of re-lending on the Stock Exchange on fortnightly account. But this last-mentioned class of business falls rather within the purview of City matters, and, as such, will be further considered in the concluding chapter. There remains the question of the private borrower.

It will not be suggested that it is outside the province of a banker to make advances on private account to a reasonable extent from time to time, to facilitate the holding of Stock Exchange securities of sufficiently high class. It would be fatuous to pretend that this sort of business is never entertained. As is well known, it is done, at times, somewhat freely. It depends largely upon whether money is abundant or the reverse. In periods of tightness, advances answering to this description would be less easy to obtain. The trading customer certainly has the prior claim to his banker's consideration.

Again, private customers will occasionally vary their security holdings. In so doing they may be acting under very competent advice. Even bankers are well advised to change the character of their investments on occasion; as witness the prescience that foresaw the approaching falls in Consols and English Railways some years back! This sort of thing cannot be likened to speculation, which term implies a feverish acquisition of holdings other than first, or even second, class, in the confident expectation of being able to sell again quickly at a profit. A mania for speculation, fostered by interested parties, and quickened by credulity, will sometimes prove almost as infectious as an epidemic of influenza. People are overtaken with the passion to grow rich quickly, and reason is thrown to the winds. Presently comes the inevitable break, with the resulting discomfiture and ruin of thousands. There has been an example within the last decade. The same sort of thing had happened frequently before, and will happen again whenever the conditions are favourable. It is certainly not within the province of a banker to facilitate the designs of unconscionable operators. The prudent banker will exert his influence to check an unduly speculative impulse wherever detected. At such times it may be difficult, if not practically impossible, to refuse every applicant of known wealth; but it is not for a banker to become associated with a person of limited means, in dealings which partake of the nature of a gamble.

The leading securities, those termed gilt-edged, and those ranking only a little below them in the scale, are well known. In cases of doubt the bank's broker can always be consulted. Usually, the higher the return the greater the risk, but this is not an invariable rule. A really good broker can always recommend sound securities that can be picked up comparatively cheaply. It is necessary to be wary of the ordinary shares of many industrial companies. Even if the shares are inherently sound, owing to the limited market the Stock Exchange quotations are

not always to be relied on, and a sale may have to be the subject of negotiation. Especially may there be a difficulty in disposing of shares of local companies not dealt in on the London Stock Exchange. Well-secured debentures of commercial companies of good standing, when they constitute a first charge with power of foreclosure, are highly esteemed; and well-covered preference shares, in like concerns, would usually be considered satisfactory. Mining shares are looked at askance. South Africans cannot fail to be depressed by the reduction in the purchasing power of gold. Unattractive, also, for security purposes, are some of the shares comprised in other classes figuring in the Stock Exchange Daily List, as, for example, land and plantation companies and financial trusts. There may be difficult times, too, in front of shipping companies, in view of reductions in freights after the unique experiences of the war. And again, exception is taken to issues emitted by countries not quite highly civilized. Mexico may be instanced as an example in recent years; and Russia, also, for the matter of that!

Care is requisite in dealing with shares not fully paid-up. If transferred outright to a banker, or his nominees, he becomes liable for the unpaid calls. And as regards shares in "private" companies, the transfer of these is necessarily in the discretion of the directors, who may decline to pass a transfer, and, conceivably, without its being incumbent upon them to assign any reason.

Stock Exchange securities may be in the form of bearers, registered stock or shares, or inscribed stock.

Bearer securities are negotiable; that is, transferable by mere delivery. Possession is *primâ facie* evidence of ownership. Scrip, which is an intermediate form of security, issued pending the payment of outstanding instalments in respect of applications for Government bonds or companies' issues, is also, by general custom, regarded as negotiable; but there may be something in the articles or constitution of a particular company importing a

qualification of the general rule. Share and stock warrants to bearer are occasionally issued under powers conferred by the Companies Acts. These are certainly negotiable; as, too, by mercantile usage, are bearer debentures. With regard to registered debentures the company may have a first lien, although this is not usual. Occasionally it is provided that bearer debentures may, as regards the principal moneys secured, become registered, the relative coupons remaining payable to bearer.

In the case of registered stocks and shares, certificates are issued, showing the name of the proprietor and particulars of the holding. The issuer is estopped from denying the validity of a certificate as against a purchaser who buys on the faith of it.

In connection with a holding in inscribed stock no certificate is issued. The stock is transferable by signature in the actual register, either personally or by attorney; the vendor, or his attorney, giving a receipt at the same time for the purchase money. This receipt is quite worthless as a document of title.

Now as regards the modes of charging these different classes of security.

If the securities are bearer it is a very simple matter. The depositor is merely asked to sign the usual "memorandum of deposit" form, giving the banker a power of sale should the occasion arise. They must be taken in good faith, however, as to which more hereafter. Nor is it essential that any written charge be taken. If lodged for the purpose of affording security a mere deposit will undoubtedly suffice. In practice it is better to take a memorandum and so prevent all possibility of dispute. And, in this connection, let it be observed that, if a memorandum is taken, the banker will be strictly bound by the terms thereof. He may only retain the securities as cover for the liabilities mentioned. It is desirable, therefore, to avoid all informal documents, whatever be the nature of the security involved, and to adhere to the

banker's usual forms, which may be depended upon to be sufficiently wide in their embrace.

In the case of a registered certificate, the only entirely safe course to be pursued is to take a transfer outright into the names of the banker or his nominees, and get it registered. The banker's usual form of memorandum of deposit should be signed at the same time. Here, again, the banker must be acting in good faith when lodging the transfer for registration. When the security is so completed, the banker would have implied power, even if no express power were conferred by the memorandum, to sell on default; and, if no actual time were fixed, then after reasonable notice.[1]

A registered certificate is not a negotiable instrument. The legal title is in the registered holder after the certificate has been delivered by the company. Now, conceivably, the registered holder is merely a trustee for another party. The beneficial interest would then be in that other party. (Companies are precluded from taking cognizance of trusts.[2]) If such a certificate were merely charged to a banker there would now be outstanding one legal interest in the holding, namely, that of the registered proprietor, and two equitable interests (interests, that is, that are recognized by the law of equity as distinct from the common law), namely, those of the beneficiary under the trust, and of the banker. It is held that, in the case of two innocent parties, where the equities are equal, the right of the first in point of time (that is, the beneficiary in this instance) prevails. But if the banker once got the legal title, in good faith (and this does not usually happen until a completed transfer is actually registered), then he would gain precedence of the beneficiary, on the established principle that, where the equities are equal, the law (that is, the common law) prevails. Similarly, if stocks or shares have

[1] *Vide* p. 54 N., re provisions of the Courts (Emergency Powers) Act.

[2] It is different in Scotland.

been transferred to a person merely by way of security, the borrower then has a beneficial interest therein, subject to the amount so secured. Yet if a banker took a transfer from the registered holder and, acting in good faith and without notice, became himself the registered holder, he would have an unimpeachable title to the full extent of his claim.

In the daily course of business bankers are constantly making advances against the deposit of certificates, resting content with their usual form of memorandum, by way of charge, with or without transfer. If a transfer is taken it is not infrequently in blank. (So much depends upon the standing of a particular customer, the extent of the security, and the nature of the accommodation.) A banker is thus in the position of equitable mortgagee; and, so long as there is no irregularity, he can enforce his security, through the medium of the Court, if he holds no transfer; or, in the case of insolvency, through the instrumentality of the trustee. Indeed, if the certificate has been lodged as security without the accompaniment of any writing, he is still, generally, in the position of an equitable mortgagee, entitling him to an order for foreclosure and transfer (*Harrold* v. *Plenty*, 1901, and *Stubbs* v. *Slater*, 1910). It was decided in the case of *Colonial Bank* v. *Whinney*, 1886, that notice to the company is immaterial where the certificate is marked to the effect that no transfer can be completed without its production. The relative shares are deemed to be *choses in action* within the meaning of the Bankruptcy Act, and, therefore, not subject to the effect of the "order and disposition" clause. Such a marking is now almost universal, and, indeed, under the rules of the Stock Exchange is precedent to the granting of a quotation. Occasionally it will be found to be omitted from certificates issued by small local companies. When that is so, a mere deposit, without writing, would not suffice to constitute an equitable mortgage. In every case it may be well to give notice of

deposit, for the reason that a company, generally, has a first lien, and the effect of notice is to limit its priority to the extent of its claim at the time notice is received (*Bradford Bank* v. *Briggs*, 1886). It is probably immaterial whether the company purports to accept notice or not.

As regards "blank transfers," a distinction is made between those requiring to be under seal and those that may be under hand only. And it does not follow, because a transfer by deed is usual in any particular case, that it is essential. It all depends upon a company's regulations. (Transfers of railway stocks, amongst others, are required to be by deed.) It has been held that if the blanks in a transfer are subsequently filled in by the mortgagee, a re-delivery is necessary to its validity *as a deed*;[1] and, therefore, if the particular case demands a deed, unless there has been a re-delivery the legal title would not pass on registration, the result being that a beneficiary would be entitled to priority (*Powell* v. *London and Provincial Bank*, 1893). But, where a transfer by deed is not essential, it is generally considered there is an implied authority to fill in the blanks. Nevertheless, if such a blank transfer is passed on by the mortgagee by way of security or sale, and the party taking it himself completes the document, the latter takes only to the extent of the original mortgagee's interest, as it has been held there is constructive notice of the limited nature of the interest. By the usage of brokers and bankers, however, an exception is made in the case of American Railroad share certificates with indorsed transfer signed in blank, unless the transfer is required to be under seal.

It is always open to an equitable mortgagee to give notice (in prescribed form) in lieu of the old writ of *distringas*. An affidavit as to his interest must first be filed

[1] Sir John Paget comments as follows: "And re-delivery by agent is insufficient unless the agent himself is authorized by deed (*Société Générale de Paris* v. *Walker*, 1885, 11 A.C. 20)."

in the central office of the Supreme Court. After receipt of such notice a company, or any institution having the service of a stock, is bound to apprise the individual giving the notice eight clear days before passing any transfer that may be presented.

Some few companies require the use of their own special form of transfer. In that case a common form would not be effectual.

An equitable mortgagee is not debarred of his remedy against his security by reason of his personal remedy being statute-barred (*London and Midland Bank* v. *Mitchell*, 1899, and *Stubbs* v. *Slater*, 1910).

If the signature to a transfer that a banker sends in for registration is forged, and a loss is thereby incurred, the banker will be held liable under an implied contract of genuineness or indemnity (*Sheffield Corporation* v. *Barclay*, 1905).

It is possible to create an equitable mortgage of inscribed stock by a carefully worded agreement of charge under hand, embodying a restraint on the mortgagor's power of sale, accompanied by a power of attorney appointing a nominee of the banker the customer's attorney to sell or transfer, and to receive the consideration money, and give receipts therefor. This would suffice to take the stock out of the effect of the "reputed ownership" clause. But the only completely satisfactory course to pursue is to take a transfer outright, as in the case of a registered holding. Holdings in various British Government issues may be transferred from "book" register to "deed" register, or converted into bearer bonds, at trifling cost, if any.

A bank has a first lien on its shares for all liabilities of the shareholders.[1] But it is not considered politic for a bank to lend to any considerable extent on the security of its own shares; and certainly not for it to lend on them up to the hilt, or anything like it, to a person of limited means.

[1] But *vide*, p. 20, as to effect of notice of charge.

It is a source of strength to a bank for its shares to be well held, having regard to the liability thereon to calls. When advances are made, in view of the decision in *Hopkinson* v. *Mortimer, Harley & Co.*, 1917, it is desirable to take a specific power of sale over the shares, unless the bank's articles of association authorize a sale in the alternative of forfeiture. Otherwise, the bank may have to go to the Court to acquire a power of sale in pursuance of its lien.

On this subject of marketable securities it now only remains to consider the question of "good faith" to which allusion has already been made. It is purely one of fact in each case. Thus, in *Earl of Sheffield* v. *London Joint Stock Bank*, 1888, a moneylender pledged, for his own general liabilities, certain bonds and railway stock certificates (with transfers in blank) that, indirectly, had been pledged with him for specific advances; the names of the bank's nominees being inserted in the blanks, and the transfers registered. It was held by the House of Lords that the securities could only be retained by the bank to the extent of the money-lender's interest; and this on the ground that it was evident the bank knew, or must be taken to have known, the moneylender was exceeding his authority, the bank being therefore put on inquiry. In *Simmons* v. *London Joint Bank*, 1892, also decided in the House of Lords, it was held that the pledging by a stockbroker of bearer bonds belonging to a customer, *en bloc* with those of other customers, even with the knowledge of the bank, did not suffice to put the bank on inquiry, as not being inconsistent with the recognized custom of stockbrokers, or with the presumable authority of customers. Lord Herschell said: "It is surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled, in order to secure a good title to yourself, to inquire into the nature of his title,

or the extent of his authority . . . I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments." And, referring to the "Sheffield" case, he added: "It is enough for me to say that the judgment leaves untouched what I believe to have been, down to that time, the established rule of law, that a person taking a negotiable instrument, *in good faith* and for value, obtains a title valid against all the world." In the case of *Bentinck* v. *London Joint Stock Bank*, 1893, there was a further development. A firm of brokers failed, having left with the bank, as cover for their general liabilities, various stock and share certificates and bearer securities, which had been purchased for a client, and in respect of which a limited authority to pledge had been given. The stocks and shares were all transferred to nominees of the bank, some of the transfers being from the client (these at nominal consideration), some from the brokers, and some from third parties. Evidence was adduced to prove that, under the established system of contango or continuation, when a purchaser on the Stock Exchange does not pay for securities at once, the person that provides the purchase money becomes (although the securities may not yet be transferred) the purchaser and absolute owner of the stocks, shares, or bonds; he, at the same time, entering into another contract to sell to the original purchaser, usually for the next account, an equal amount of the same description of stocks, shares, or bonds. And that, when a broker deposited the original stocks, shares, or bonds with his banker, as security for advances, there would be nothing to indicate to the latter that they were not the broker's own property. It was held, especially on this evidence, that there was, in fact, nothing to lead the bank to suppose the securities were not the broker's own property, and that it was immaterial whether they were deposited *en bloc* or otherwise, from which it followed that the legal title of the bank could not be impeached. As to the stocks and shares of which the client had himself

executed transfers he was estopped from denying that the brokers had authority to pledge them to the bank for their full value, and, as to the bonds, that they were negotiable instruments, and, accordingly, the client could not redeem without paying the full amount due to the bank.

NOTE.—Sir John Paget suggests that *Lloyds Bank and Others* v. *Swiss Bankverein* in the Court of Appeal, 1912, is a good case following the lines of the *Sheffield* and *Simmons* cases. Bill-brokers gave cheques for bonds that had been deposited for security. The cheques being dishonoured the plaintiffs sued the defendants, who had the same day received the bonds from the bill-brokers, alleging that by custom or usage they could follow the bonds until the cheques were cleared. The Court of Appeal held that such usage was repugnant to the nature of the instruments.

CHAPTER IV

ADVANCES AGAINST GOODS AND PRODUCE

FOR different reasons, banks, in the past, have fought more or less shy of making advances against the security of goods and produce. In the minds of shareholders and boards of directors alike there has existed a considerable degree of prejudice against this class of business, and some banks have held themselves almost entirely aloof from it. They have preferred to proceed on the old and well-established lines, in pursuance of which their undertakings have prospered and expanded. And, it will be admitted, there is every justification for a bank in proceeding cautiously and tentatively when it is a question of any departure from its recognized policy.

The law with regard to the kind of security involved in this connection was formerly less settled and satisfactory than it has since become. It is still a difficult branch of legal science to comprehend aright, and one calling for careful training combined with experience. Until lately few banking men were to be found properly equipped to cope with business of the kind, but this state of affairs is now rapidly becoming changed.

Another reason for the old prejudice referred to was that this class of business was considered too speculative. Markets are often unstable, and goods or produce may, at times, be difficult of realization. It is just when markets are "slumping" that lenders are most likely to have to enforce their security, and when everyone is selling prices will become more and more depressed. Some things, like provisions, are liable to rapid deterioration, and cannot, therefore, be held up indefinitely. Besides this, warehouse rents increase quickly; and a bank's security may, in this way, soon "eat its own head off." Stocks and shares have their set-backs, but, if inherently sound, there is not the

same insistence for early liquidation. On the other hand, it is equally true that some kinds of produce are more readily saleable during a financial crisis than are stocks and shares. Witness, for example, the conditions that obtained in August, 1914! Moreover, advances thereon are, or ought to be, in the lines of a man's ordinary business, thereby, so far, directly facilitating legitimate trade. They are temporary, too, in character—the period, usually, does not exceed three months. The bank's money, therefore, is quickly turned—a great desideratum from the bank's point of view. All this cannot, so confidently, be said about advances made on some other forms of security. And there is no gainsaying that to accommodate legitimate traders in this way tends directly to economy in the use of capital. There are many well-to-do firms, having all their capital employed in their business, to whom it may be inconvenient to lodge cover in another form for some temporary drawing facilities. Each bank will, of course, decide for itself what proportion of its resources it can allocate hereto. Business answering to this description is already done by them on a large scale, and that there will be an increasing amount of competition for it in the future may be confidently assumed.

It goes without saying that it is very necessary for a banker, who is embarking hereon, to acquire familiarity with the different markets, and to keep closely in touch with them. In particular, he must learn to beware of those artificial inflations in prices in certain commodities that are brought about by "rings" and "corners"—inflations that bring in the needy speculators, who have everything to gain and nothing to lose. For, after the promoters have worked their sweet will, and successfully unloaded, the "slump" will follow as the night the day. Be it observed, too, that falling markets do not invariably recover, even when left to the natural laws of supply and demand. Changes in habits, fashions, or modes of manufacture, may bring about an ever-lessening demand for particular

commodities, involving more and more restricted markets. For the every-day necessaries of life, such as corn, wool, cotton, iron, etc., there is a fairly constant demand; and, however prices may fluctuate, the markets therein will be always free.

A reference to fluctuations naturally introduces the questions of margins and valuations.

Margins are provided either by way of reductions in the amounts of advances or by lodgment of additional cover. And margins must be maintained. It is a test of a man's solvency when, confronted with falling markets, he is able to respond to the call for margin.

In dealing with a customer of limited means the rule is, or should be, to require a broker's valuation by actual sample. But where the borrower is possessed of substantial capital, the evidence of invoices and market quotations combined (which can generally be supplemented by judicious outside inquiry) will probably be accepted. With regard to imports liable to duty it should be noted that the market quotations are usually the prices "in bond."

Last, but not least, there is the question of a man's business reputation for integrity and fair dealing. There are so many opportunities for the practice of deceit and fraud in connection with this class of advance that it is far the best way to decline to entertain, in any shape or form, an application from a person whose commercial character is not entirely above suspicion.

When advancing against documents, although no agreement may be essential as an accompaniment to the pledge, it is usual to have one. There are fairly stereotyped forms in use by bankers, which incorporate an undertaking to maintain margins, and a power of sale, exercisable, on non-compliance with the conditions, at any time at the banker's discretion. In case the relative goods have been contracted to be sold there should be a specific assignment of the price to be paid. An agreement is usually drawn as a "continuing" security. But sometimes it may be

desirable, in view of what appears hereafter[1] *with regard to the effect, under certain conditions, of exchanges of securities and of their lodgment for pre-existing debts, to ear-mark every security against the advance for which it is primarily lodged; and this is best done by opening a* separate loan account in respect of each transaction. If exchanges are contemplated the agreement may be made to extend to the substituted securities; and in any case there is a condition imported that the securities (whether original or substituted) are to be held for all liabilities, due or to become due. Where fire policies are not lodged there should be included an authorization to the banker to insure, and add the premiums to the advance.

It should be understood that a *pledge* always involves delivery of possession, actual or constructive, as where the relative documents are handed over, or the key of the warehouse containing the goods. It confers only what the lawyers term a "special property" in the goods. Yet a pledge imports, in itself, a power of sale on default, so that a banker, as pledgee, even without express agreement, will have the right to realize his security should the occasion arise, after giving reasonable notice of his intention so to do.

Goods may also be the subject of a *mortgage*. In a mortgage there is a conveyance of the "entire property," by way of security, with or without transfer of possession. (The Bills of Sale Act, 1878, does not extend to the transfers of goods in the ordinary course of business of any trade or calling, or to documents used in connection therewith.)[2] There is usually a proviso that, on default, the mortgagee may take possession. When once in possession he can sell, on default, after reasonable notice given.

[1] *Vide*, p. 40.

[2] Sir John Paget comments as follows: "Personally I should have doubted whether the pledge or mortgage of goods to secure an advance was outside the Bills of Sale Act, but the decision of Bingham J. in *In re Hamilton Young & Co.* is authority that such is the case."

There is yet another mode of procedure, namely, by a *contract of hypothecation.*[1] This is an agreement, usually in writing (though a verbal agreement has been held to be valid) to give a security over goods, or over the documents for goods, without at the time conferring possession or conveying the "entire property." It is an undertaking to pledge subsequently. Such contracts are good in equity, although not recognized in common law. Even if the goods are not already acquired by the customer, or called into existence, such a contract has been held to be valid when made for valuable consideration. There is a risk, however, of legal rights being acquired, without notice of the contract, by other parties, and of priorities being thereby lost. To illustrate the principle, it may be well to examine the well-known case, referred to in all the text-books, *In re Hamilton, Young & Co.*, 1905.

Hamilton, Young & Co. were a Manchester firm, engaged in the shipment of goods to the East. They bought cloth, which they got bleached and dyed, and consigned it to a firm in Calcutta, Ewing & Co. They were financed by the National Bank of India, who took a letter of lien in the following terms: "We beg to advise having drawn a cheque on you for £—, which amount please place to the debit of our loan account No. 2, as a loan, on the security of goods in the course of preparation for shipment to the East. As security for this advance we hold on your account, and under lien to you, the under-mentioned goods in the hands of —— as per their receipt enclosed. These goods, when ready, will be shipped to Calcutta, and the bills of lading, duly indorsed, will be handed to you, and we then undertake to repay the above advance, either in cash, or from the proceeds of our drafts on Ewing & Co., Calcutta, to be negotiated by you, and secured by the shipping documents representing the above-mentioned goods, etc., etc." When goods to the value of a particular cheque were ready

[1] The word "hypothecation" is often used in a general sense as meaning an equitable charge, lien, or pledge. The use of the word originated in connection with shipping.

the goods were shipped accordingly, bill of lading and copy of invoice being handed to the bank, with a trust receipt to be signed by Ewing & Co., and written instructions to the bank as to disposal of proceeds. These were accompanied by a shipment letter in the following terms: "Having this day received an advance from you of £—, bearing interest at 6 per cent. per annum, we hereby hand you as collateral security for the due repayment of such advance and interest, bills of lading, invoices, and policies of insurance for —— packages per —— to Calcutta, as described at the foot hereof, which documents are to be handed to your Calcutta agency. Our agreement is as follows: Firstly, that on arrival of the documents in Calcutta, they will be handed to Ewing & Co. by your agents, who will receive, in exchange, a formal lien over them and the goods they represent, and an undertaking to provide for fire insurance. Secondly, that within six months after the date of the above advance, Ewing & Co. will release the documents above referred to by delivering to your said agent a telegraphic transfer, or demand draft on London, for the equivalent amount of the said advance, together with interest, etc."

As against Hamilton, Young & Co.'s trustee in bankruptcy, it was held that the documents were such as were used in the ordinary course of business as proof of the possession or control of goods," and therefore did not constitute a bill of sale, liable to registration; and that the earmarked goods in the hands of the bleachers at the commencement of the bankruptcy were not "in the possession, order, or disposition of the bankrupts," as "the reputed owners thereof," within the meaning of sec. 44 of the Bankruptcy Act, 1883. Bigham, J., said, referring to the letter of lien, "this document evidences a transaction of the most ordinary kind as between bankers and merchants. Such transactions happen by the score every day in the week in places of business like Manchester."

The great disadvantage bankers formerly laboured

under, when advancing on the security of goods or produce, lay in the fact that, by the general rule under the common law, a person in possession of goods cannot, except in the case of a sale in market overt, confer on another, by way of either sale or pledge, any better title than he himself possesses. But the effect of this general rule is now largely modified by the provisions of the Sale of Goods and Factors Acts. These Acts afford protection in the great majority of cases where a buyer, or pledgee, is dealing, in good faith, with a person in the actual possession of goods or documents. "Nevertheless, the legislature has not carried the rights of a purchaser under these Acts so far as to make the sale equivalent to a sale in market overt. A purchaser must accept the risk of his vendor having found, or stolen, the goods or documents, or otherwise got the possession of them without the consent of the owner."[1]

Before pursuing inquiry further in this direction, it will be convenient to discuss the principal documents "used in the ordinary course of business as proof of the possession or control of goods." And first as regards *bills of lading*.

Bills of lading were always regarded by the law merchant as symbols of title. Bowen, L. J., said, in the case of *Sanders* v. *Maclean*, 1883: "A cargo at sea, while in the hands of the carrier, is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading, by the law merchant, is universally recognized as its symbol, and the indorsement and delivery of the bill of lading operate as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as, under similar circumstances, the property would pass by an actual delivery of the goods. And, for the purpose of passing such property in the goods, and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore

[1] *Vide, The Law of Bankers*, by Grant.

to someone rightfully claiming under it, remains in force as a symbol, and carries with it, not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which, in the hands of a rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be. The above effect and powers belong to any one of the set of original bills of lading which is first dealt with by the shipper. Except in furtherance of the title so created of the indorsee, the other originals of the set are, as against it, perfectly ineffectual, and have no efficacy whatever, unless they are fraudulently used for the purposes of deceit."

A bill of lading is not a strictly negotiable document in the same sense that a cheque is.[1] If a properly indorsed cheque or a bearer cheque, not crossed "not negotiable," is stolen, a party taking it, in good faith and for valuable consideration, acquires a good title thereto. If crossed "not negotiable" it can still be negotiated, but the party to whom it is paid away cannot acquire a better title than had the previous holder. A bill of lading bears some comparison thereto. Yet, as will be discovered later on, under certain conditions it acquires a much wider quality of negotiability than is possessed by a non-negotiable cheque.

In its pristine form, still in use by sailing-ship owners, a bill of lading is a simple-looking document, but in forms now adopted by the owners of steamers it is decidedly, more or less, complex. Many clauses and conditions are added which call for careful scrutiny and consideration, especially on the part of underwriters. In its essence it is the master's receipt for goods shipped for transmission to other ports, and there is embodied an undertaking to deliver to the shipper, or his assigns (less frequently, to the consignee, or his assigns), he, or they, paying freight. The master merely certifies by number or weight, and is

[1] Sir John Paget suggests a reference to Scrutton on *Charterparties*, 1917 edit., "where this point is admirably stated."

in no way responsible for the actual contents of parcels. There is also contained an agreement as to general average, that is, apportionment, among all the parties interested, of loss caused intentionally for the preservation of the ship; for example, the throwing overboard of the cargo, known as jettison. If the word "assigns" is omitted, any assignment should be made specifically. In all the usual forms the word is imported; and under the Bills of Lading Act of 1855 indorsement has the effect of transferring the contract, with its rights and liabilities, so that the indorsee can, in his own name, sue the ship-owner for damages in respect of any breach, and will, in turn, be liable for the freight and other charges as, for example, demurrage. But a mere pledgee is not bound to privity, if he prefers to avoid the contract (*Sewell* v. *Burdick*, 1884). He can realize, on default, but that, of course, would involve the payment of freight and all charges. Even an application for the goods on the part of the pledgee might be construed as privity, saddling him with all liabilities incident to the contract.

There is frequently to be found in a bill of lading the clause, "freight, and all other conditions, as per charter-party." It is not, ordinarily, met with in the bills of lading of lines running their own steamers. If a particular consignment is sufficiently bulky, a whole ship is chartered for the voyage, at so much per ton freight. The relative agreement is termed the charterparty. In the case of a smaller consignment some other charterer may be found, willing to enter into an arrangement for transport. Or the services of a "tramp," a class of steamers that calls from port to port on the chance of being able to complete a full cargo, may be requisitioned. Be that as it may, if the condition referred to is imported, it is always well to see the terms of the charterparty, for the reason that the holder of the bill of lading may be rendered liable to pay charterparty demurrage incurred at the port of loading or discharge, even though delays may be occasioned by other

consignees. He may also be liable for dead-weight. This arises by reason of a cargo being an incomplete one. Under the terms of the charterparty, freight is payable on a full cargo, whether carried or not, and the ship-owner has a lien on what cargo there is to answer the claim.

A bill of lading, indorsed in blank (if in favour of the shipper), may be mailed, together with marine insurance policy, and (where the whole ship is chartered) the charter-party, direct to the consignee; thus enabling the latter to claim the goods immediately upon arrival, first paying the freight to the ship-owner's agent on the spot, if not previously paid. Upon payment of the freight he will obtain a freight release. This will be presented to the captain, along with the bill of lading, who will then be prepared to deliver the goods to a wharfinger for storage, or they may be warehoused with the dock authorities. But, often, the consignor will attach all the documents, including invoice, to a relative bill of exchange, which he will negotiate with a banker in his own country, or entrust to him for collection, on the condition that the documents are to be delivered to the drawee on acceptance, or on payment, as expressed. Occasionally the bill of exchange is sent direct to the consignee with the relative documents. Under the Sale of Goods Act, 1893, where a bill of exchange is sent direct to a buyer, with documents to be given up against acceptance or payment, he is bound to honour the draft or return the documents. Failing his doing so, the "property" does not pass to him.[1]

Bills of lading are usually drawn in sets of three—sometimes more or sometimes less—"one being accomplished, the others to stand void." A banker would, for greater safety, forward the parts to his agent by different mails. If sent direct to the buyer a second part would be forwarded to the seller's agent. The person who holds the one part, for value, is entitled to claim the other parts from those persons in whose hands they may be.

[1] *Vide* p. 41.

It sometimes happens that a consignee of good commercial standing will arrange with his banker to take up a bill and retain the documents as security. But it is more usual for this class of business to be done through a broker—one of a class who make a specjality of it. A broker is sometimes able to procure samples overland, ahead of the ship. Certainly a banker would not care to advance very much to a person of limited means, on the security of merchandise still at sea. Where advances are made the banker will see to it, on the arrival of the ship, that the merchandise is properly stored. He may require a wharfinger to act for him, or he may let his customer have the documents on trust, to do the needful.

If a banker advances against a part only of a set, and the remainder of the set is not, at the moment, procurable, it may be desirable for him to give notice of his lien to the ship immediately on arrival, so as to obviate the possibility of fraud, as the master may, in the absence of notice and in good faith, safely deliver against the first part presented. Where he has notice, or knowledge, that another party has a prior claim, he will stand in the position of stakeholder, and must interplead if the question is not otherwise satisfactorily disposed of (*Glyn, Mills & Co.* v. *E. & W. India Dock Co.*, 1882). Should it transpire that, by reason of fraud, there are two holders for value in good faith, the Court will decide in favour of the first who gets the transfer of title, even though it be through one part only of the set.

In case the goods are not claimed on arrival of the ship, they will be landed and stored with the dock authorities (subject to landing charges and warehouse charges accruing), the master putting a stop on for freight and demurrage. Whilst so stored the bill of lading remains a living instrument of title, as it was when the goods were still at sea.

There is one other point in connection with bills of lading that should be referred to. That is, the vendor's right of

stoppage *in transitu*. Sec. 44 of the Sale of Goods Act, 1893, reads—

"Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*; that is to say, he may resume possession of the goods as long as they are in course of transit,[1] and may retain them until payment or tender of the price."[2]

Warrants and *warehouse certificates* are the next documents that come up for consideration.

The warrants issued by some corporations and companies under the powers conferred by their private Acts, are documents of title. In other cases warrants are not, strictly speaking, documents of title, although, by custom, they may be regarded as such and as being, practically, on the same footing as bills of lading. In the hands of a pledgee a warrant confers a good title against a trustee in bankruptcy.

In form, a warrant is an undertaking to deliver the goods specified to the person named, or his assigns, by indorsement. Sometimes the undertaking is to the wharfinger or his assigns; and, very occasionally, to "bearer."

No warrant for an import will be issued until the freight is paid, though one may be issued before landing charges have been defrayed. This would be for the whole consignment and is termed a *prime warrant*. It is usually suggestive of impecuniosity. On payment of landing and other charges to date the prime warrant can be exchanged for *dock warrants*.

When parcels of goods, stored either with a dock company or with a private wharfinger, are sold, warrants are obtainable in a form showing the prompt, with a reference in the margin to the relative "weight-" or "gauge-note," in some such terms as follows—

"*Observe.* A weight-note for these goods has been

[1] *i.e.*, by land or by water.
[2] *Vide*, p. 41.

issued, and no delivery will be made under this warrant before the expiration of the prompt, without the production of such weight-note. The possessor of the weight-note is entitled to the warrant upon complying with the condition of sale and paying the balance of the purchase money as expressed on the weight-note on or before the expiration of the prompt."[1]

The prompt is the date on which the balance of the purchase money beyond the amount of the deposit (the deposit being usually 15 per cent. or 20 per cent.) has to be paid. The holder of the weight- or gauge-note is entitled to the relative warrant on payment of the balance of the purchase money at any time before the prompt, which is usually three months after date of contract, but in some trades less. If he fails to pay, the weight- or gauge-note is void. In taking a warrant indicating an undue prompt, allowance must be made accordingly.

Warrants can be divided on application.

Warehouse-keepers' certificates are often drawn in a form acknowledging that certain goods are held at the disposal of a person named therein, but marked "not transferable." The mere lodgment, by the owner, of such a certificate with a pledgee, would not suffice to take the relative goods out of the effect of the "order and disposition" clause. The goods, in such case, should be hypothecated by writing; or, better still, should be transferred, outright, into the name of the pledgee. But where the warehouse-keeper's certificate is drawn in the form of a warrant, acknowledging goods are deliverable to a person named, or his assigns, it is different. There is a form extensively in use in Liverpool and other places outside London, framed as above, but reserving a lien, not only for specific rent, but for all rent and charges at any time owing by the party named. In the hands of a pledgee it would, doubtless, be good as against a trustee in bankruptcy; but it would obviously constitute a precarious sort of

[1] St. Katherine Dock Warehouse Warrant.

security, unless the warehouse-keeper waived his right to such general lien.

Of course the financial standing of the warehouse-keeper himself is an important factor to be considered in connection with the question of advances against any documents he may issue.

The only other document it is proposed to discuss is the *delivery order*.

Delivery orders are simply the written instructions of the owners of goods, addressed to the persons with whom they are bailed, to deliver in whole or part. They are transferable by indorsement.

The mere possession by a banker, as pledgee, of a delivery order issued by a customer himself, will not, in the event of bankruptcy, suffice to take the goods out of the effect of the "order and disposition" clause; "for, until presented to the warehouseman or wharfinger, and he attorns to the holder, the goods remain in the possession, order and disposition of the original owner, who still has it in his power to countermand his first order, or to issue a second order in favour of himself or another assignee."[1] If A pledges a delivery order by B, duly indorsed, and then fails, the question of A's "order and disposition" does not arise; at least, in relation to the trustee. But, in view of what appears above, a customer's own delivery order should be lodged for transfer of the goods into the banker's name, or for exchange for warrants, without delay. At the same time an admission should be obtained that the goods are actually held and that the order will immediately be acted upon. Otherwise, it may subsequently transpire that another order has been presented just previously; and it has been held that delivery orders take precedence in accordance with the order of presentation. (This is a point to be borne in mind in connection with all delivery orders, whether issued by the customer or not.) A delivery-

[1] *Vide*, "Banker's Liens and Rights," by Butterworth (*Institute of Bankers' Journal* for March, 1902).

order has been likened to a cheque. "Practically a cheque is a delivery order for money."[1] An indorsee runs the risk, too, of losing recourse against a prior indorser if the delivery order is not presented within a reasonable time.

The ground is now made easier for a closer examination of the provisions of the Sale of Goods and Factors Acts, so far as they affect the general common law rule that a possessor of goods cannot pass on a better title than he himself has.

There is a large business done, nowadays, by way of brokers' loans. Owners not only entrust goods to brokers for sale, but also for the purpose of raising money on the security thereof. When a produce-broker takes a loan from a banker the presumption is that the goods, or documents, he pledges, are not his own absolute property. Formerly he could not deal with them beyond the scope of his mandate. But now, when the owner leaves goods or documents with a broker to deal with, and these are pledged by the broker, the question of limited agency can (except as below stated) no longer be raised; assuming, that is, that the pledgee takes in good faith, and has no notice, at the time of the pledge, of any absence of authority.

The Factors Act, 1889, provides—

> "Where a mercantile agent is, with the consent of the owner, in possession of goods, or of the documents of title to goods, any sale, pledge, or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not, at the time of the disposition, notice that the person making the disposition has not authority to make the same.

[1] *Vide*, "Produce as Security for Bankers' Advances," by Mr. G. R. S. Gallaher (*Institute of Bankers' Journal* for February, 1889).

"The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

"The expression 'goods' shall include wares and merchandise," and "the expression 'documents of title' shall include any bill of lading, dock warrant, warehouse-keepers' certificate and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorsement or delivery, the possessor of the document to transfer or receive goods thereby represented."

Thus, it will be seen that, *for the purposes of the Act*, even warehouse-keepers' certificates and delivery orders are documents of title. They are not so when pledged by an agent other than a "mercantile agent" as defined by the Act.

As regards "with consent of the owner," Sir John Paget, in *The Law of Banking*, says: ". . . the consent will be good enough, notwithstanding it may have been fraudulently obtained, provided the fraud did not amount to larceny by a trick."

But the Act goes on to provide that, where such a pledge is for the purpose of securing an antecedent debt of the mercantile agent's own, the pledgee acquires only the right the mercantile agent could have enforced at the time of pledge. And again, when the pledge is by way of exchange, the pledgee acquires no right or interest in the substituted goods beyond the value of those given in exchange.

A further provision is that, where a shipper is apparently the owner, and a consignee knows nothing to the contrary, the consignee, in respect of advances made on the goods, has the same lien as if the consignor were the owner; and

this, notwithstanding the shipper be not a "mercantile agent."

Other provisions, embodied also in the Sales of Goods Act, 1893, deal with transactions between sellers and buyers apart from the question of agency. Thus, a seller, who is allowed to remain in possession of goods or documents, can effectually sell, or pledge, to an innocent third party. Similarly, a buyer, who has obtained, with the consent of the seller, possession of goods or documents, can effectually sell, or pledge, to an innocent third party. Lastly, when an unpaid seller of goods lawfully transfers to a person as a buyer or owner of goods a relative document of title, and the latter again transfers to an innocent third party for valuable consideration, the unpaid seller's lien and right of stoppage *in transitu* will be defeated.

A bill, with documents attached, was sent direct to the buyer, who did not accept, and failed before stoppage *in transitu*, having transferred the bill of lading for good consideration. It was held, under the Statutes, that the right of stoppage *in transitu* was defeated[1] (*Cahn* v. *Pockett Bristol Channel Co.*, 1899).

A banker, as pledgee, may re-deliver documents to his customer, for a limited purpose, without losing his rights. (The "order and disposition" clause does not extend to trusts.)

A bank so re-delivered a bill of lading to enable the pledgor to obtain delivery of the merchandise, sell on its behalf, and account for the proceeds. Held that the bank was entitled to follow the proceeds into the hands of other creditors (*North Western Bank* v. *Poynter, Son & Macdonalds*, 1895).[2]

In practice, documents are freely re-delivered on "trust-letters." Thus, bills of lading are lent to the pledgor for

[1] *Vide*, pp. 34 and 36.

[2] Sir John Paget comments as follows: "It might be worth while to add a caution that dealings of this sort are open to the objection that there is no very defined rule as to what is or is not inconsistent with retention of the rights of pledge. But such dealings appear to be fairly wide-spread and recognized in business."

the purpose of obtaining delivery of goods from the ship, to be warehoused; the pledgor undertaking to procure warrants and lodge them with the banker forthwith. Or, on the occasion of a sale, warrants may be borrowed under trust-letter for the purpose of delivery of goods to the buyer, the pledgor undertaking to pay the proceeds to the banker immediately on receipt. When the customer is a broker, the bill of lading may be lent to him under an arrangement whereby he is to get delivery, sell, and account to the banker, holding in safe custody meantime as trustee for the banker; the banker retaining the right, in case he should wish to exercise it, of collecting the proceeds himself. So, when goods are warehoused in a banker's name by way of security, he may give his customer delivery orders against undertaking to pay in proceeds of sales received. Sometimes the trust-letter contemplates substitution of goods, the substituted goods to be held in pledge in place of the original goods, there being included an undertaking, in default of substitution, to account for the cash proceeds of the goods sold, with a specific assignment thereof.

Forms corresponding to the above are extensively in use in Liverpool in connection with advances on cotton. And, whilst speaking of cotton, reference might, with advantage, be made to the use of "futures" as a "hedge" in financial transactions connected with the trade, whereby the element of speculation is largely eliminated. The system has an equalizing effect in the sense that there will be no considerable gainers and no considerable losers, whatever the fluctuations in values may be. "Any merchant nowadays importing cotton without 'hedging' it by a sale of 'futures' would be carrying on his business as a sheer speculation, and whatever his reputed means, no bank would trust him any farther than his available securities in its hands would warrant. Indeed, it would rather not have the account at all."[1]

When an importer purchases cotton in America he

[1] *Vide, Cotton Futures*, by Mr. Charles Stewart.

operates on the basis of the price it is anticipated will be ruling when the cotton comes to be sold here; and, as an insurance against the risk of a fall in price, he, at the same time, sells "futures" to the weight of the purchases. In his calculations he allows, of course, for all costs and for his margin of profit. Whatever fall may take place in the interval, the cotton, if need be, could be tendered against the sale at the protecting price. But sales of "futures" as hedges seldom proceed to finality. The necessary machinery for the system is provided by the Clearing House of the Liverpool Cotton Association, the committee of which fix prices in the different positions (that is, months of delivery) weekly; and, each week, differences have to be paid in cash. What is gained or lost each week on the "future" sale is lost or gained in the value of the cotton. And at any time a "future" sale can be closed in whole or part, according to the amount of cotton still retained by the merchant, by means of a purchase of a "future" at the ruling price. It is immaterial who the seller may be—that is a matter of adjustment between the broker and the Clearing House. Prices are fixed by the Committee on a standard basis of quality, which is the "middling" grade of American cotton. So far as the cotton that may eventually be tendered may fall a little above or below that standard, there will be an adjustment by arbitration.

"Futures" are also employed as hedge sales in connection with yarn and cloth. The prices of yarn and cloth hinge principally on the price of cotton; and so, cotton "futures" are sold against accumulations of stocks, and are, similarly, bought in when the hedge is no longer required.

And not only are there hedge sales in "futures" but also hedge purchases, as, for example, where a manufacturer is heavily committed to deliveries. To insure against a more or less disastrous rise in the value of cotton he will buy "futures," which he will gradually get rid of as the need for their protection declines.

Shippers abroad hedge in the same way in respect of

forward deliveries of raw material to which they may stand committed.

The "order and disposition" clause has no application in the case of limited companies. It may, consequently, be feasible for goods pledged by a company to a banker to go into the company's own warehouse, under a carefully-drawn trust-letter (provided they are ear-marked and certain formalities are observed), without the banker losing his rights. In all such cases, however, competent legal advice should be obtained.

CHAPTER V

ADVANCES AGAINST REAL PROPERTY

IT is contrary to all the best traditions of banking as understood in this country to make advances of a permanent character on the security of real property; such advances, that is, as are of the nature of loans granted, nominally, for stated periods, but which are practically certain to come up for renewal again and again.

Real property does not constitute a liquid form of security. Rather may it be described as "dead," in the sense that it is not readily marketable, and may, indeed, be found to be practically unrealizable in times of financial stress, just when a banker particularly requires to draw on his resources. Bankers should not usurp the functions of solicitors and building societies. Yet it may be a perfectly legitimate procedure for a banker to give temporary assistance to a man in business, who has a fair capital of his own, on the security of his deeds or those of his friends. On this subject Gilbart says, in his treatise on the *Practice of Banking*: "The value of the property should be much higher than the sum it is intended to guarantee. When this is the case, and the parties fail, their creditors may take the deeds and pay the debt due to the bank. The main use of taking deeds is to have something to fall back upon in this way." And, in another place: "No banker takes deeds if there is the slightest probability of his being compelled to realize the property, as the legal difficulties are very great." Counsel of perfection, it may be considered, but the propositions are substantially true, nevertheless. It will be noticed that two points are raised, one as to value, and the other as to the legal question, both

of which, in turn, it is now proposed to deal with. First, as to value.

Where deeds are relied on, it is desirable to have a valuation of the property by a reputable valuer, who should fully understand the purpose for which his valuation is required. It is not always safe to rely on a pre-existing valuation, as this may have been procured in quite a different connection. The consideration money may be some guide, but it is not a dependable one. Fancy prices are sometimes paid. A purchaser is generally, more or less, anxious to buy, often for his own occupation; and it does not follow that the figure he goes to, or anything approaching it, will be procurable on a re-sale. There are many factors, present and prospective, entering into any question of value, with regard to which only a thoroughly experienced valuer is competent to advise. The real question is, what are the prospects of finding a purchaser at a satisfactory figure in the event of the property having to be realized? Much depends upon locality and the immediate surroundings. When a row of shops springs up in a new area, for instance, many vicissitudes may be experienced before a real standard of value is established. Age, condition, and sanitary arrangements of buildings, all call for investigation. The sanitary and other arrangements of factories, in particular, are of importance, having regard to the large powers now conferred on public authorities. Values may be affected, too, by easements, or restrictions of the user. Then there are the questions of landlord's outgoings, and letting possibilities. Is the property likely, always, to procure a net income of, say, double the interest on the amount of the proposed advance? In the case of weekly properties, where the landlord pays the rates, very liberal allowances indeed must be made for outgoings. Expenses of management are high; voids frequent; rents often in arrears. And there is the Housing of the Working-Classes and Town Planning Act to be borne in mind. Under the provisions of this Act, when the property is below a

certain annual value, landlords are rendered responsible for all accidents and injuries sustained by tenants that are traceable to dilapidations. Also, what of the operation of the new Housing Act? And, consider, further, how does it accord with the dignity of a great bank to go into possession of such property, and extract a few shillings a week from struggling and recalcitrant tenants? Palpably, weekly property is not an ideal form of bankers' security!

With regard to agricultural land, fluctuations in prices are often very considerable, as witness the boom within the last year or two. It has been no uncommon occurrence for a farm to be sold at over forty years' purchase, based on existing rents. Yet it is not so many years since large tracts of land in the Eastern Counties went out of cultivation as not producing sufficient to pay even the tithe rent-charge. Tithe rent-charge varies widely; and there are other charges on rural land, monastic or otherwise, frequently to be met with, of which Mr. Howard Martin, in a lecture before the Institute of Bankers on "Valuations for Mortgage of Real Property," a few years ago, gave some striking illustrations.[1] In some districts, too, there is a liability for heavy Drainage Board rates, which are assessed on all local property, whether directly benefiting from relative expenditure or not.

And now as to the legal question.

A banker makes it a general rule that title deeds deposited for security shall be examined by his own solicitor, although an exception may be made when a well-known solicitor, of high repute, has recently acted for the purchaser.

The law of conveyancing is notoriously complex and full of pitfalls to the uninitiated. A weak link (not necessarily of design) in the chain of title may, subsequently, be the cause of endless trouble and expense if a good marketable title is to be deduced; even if, by any means,

[1] *Vide, Journal of the Institute of Bankers* for January, 1911.

the flaw is found capable of rectification. For instance, the omission of a word or two from the "habendum" of a conveyance may have the effect of conferring a life interest only, instead of the "fee simple." Again, as Williams points out in his treatise on *Real Property*, it is just possible for a man, by misrepresentation, to convey as a fee simple a property he has already put into marriage settlement, under which he has retained to himself only a life interest. Or once again. The owner of a rent-charge is not entitled to the custody of the deeds; and, if created by will or settlement, a rent-charge, generally speaking, is not a subject of registration. It may even be that a part of a property has been sold and no memorandum endorsed on the conveyance. It is not incumbent on anyone, indeed, to make such an endorsement. From what has been said above, it will be obvious that conveyancing provides a wide field for the practice of fraud, which only the exercise of considerable legal skill can circumvent.

Even when a purchaser is in view, and the title is in order, it must be remembered that the legal expenses in connection with the disposal of real property are considerably higher than is the case, for instance, with stocks and shares.

No reference, hitherto, has been made to "leaseholds." A leasehold, of course, involves the liability to pay the ground rent and to observe the covenants, which latter are often of an onerous character. There may be included covenants for improvements and for keeping a property in going order; and such covenants, especially in a lease of factory property, may prove a source of great embarrassment. In short-leases a "bankruptcy clause" is not unusual; nor is a restraint on sub-letting or assignment, though the restraint may be coupled with a proviso that a consent would not, unreasonably, be withheld.

Even a freehold may be subject to what is, practically, a ground rent. In some districts, *e.g.*, Liverpool and Bristol, it is a common thing for land to be paid for by way

of a perpetual yearly rent-charge, called a "fee farm rent." These fee farm rents, too, are sometimes created out of existing buildings, when they may bear no relation to the value of the land; and not infrequently they constitute what is a palpable first mortgage on the property, although the unwary, without close regard to the character of the actual security afforded, may be induced to buy at "fee farm rent" prices. Builders, not uncommonly, develop estates on the same principle. Secured ground rents command better prices in proportion to the returns than do leasehold houses; so, as soon as a house is finished, as big a ground rent as possible is piled on. In this connection it may be well to point out how necessary it is, in advancing on new house-property, to make quite sure that the buildings are erected on the actual plots charged. Errors occasionally creep into conveyances in this respect, and practised fraud has not been unknown. It should also be noted that ground rents and fee farm rents are frequently "apportioned" out of superior rents. In such a case the owner of the superior rent is entitled to collect the whole from the owner of any portion of the property subject thereto, leaving that owner to exercise his right of redress against the owners of the other portions of the property.

Ground rents and fee farm rents are sometimes offered as banking cover. If well-secured they are considered fairly satisfactory for the purpose, as being more or less readily saleable. But the title, in each case, should be carefully investigated by the bank's solicitor.

As regards building-land, it must be realized at once that this, of course, is no sort of security for a banker to hold. Factories, works, and mines, fall under much the same category. They certainly should never be taken unless the customer is considered quite good irrespective thereof. Collieries and mines become exhausted in time. They resemble leases, in that they call for the creation of special redemption funds. And as for factories and works, it often happens that, when a relative business fails, the

premises fail with it. Like a false friend, such a security forsakes one just when help is needed. The probability is that the very defects of a factory or works have largely conduced to a business failure. Premises and plant have become obsolete in the sense that they can no longer be run on the most economical lines. In these days of fierce competition factories and works are often "scrapped," without compunction, when they have ceased to be thoroughly up to date. With rapidly-changing conditions, the life of any fixed plant or machinery is never very long; and well-conducted concerns allow lavishly for depreciation, over and above actual expenditure on up-keep. The increased cost of building and machinery renders provision more than ever necessary. In any question of value, of course, situation may be a considerable factor; and, although even our largest industries are liable to great waves of depression, clearly a modern factory, well-placed in the centre of an established manufacturing area, is a totally different proposition from an isolated one, standing in a district where communication is difficult and labour scarce. Some failures are directly traceable to mis-management, and when that is so a reconstruction may be followed by success. But the general experience is that, when bankruptcy comes, unless a factory or works is of an exceptionally adaptable character, it will seldom fetch much more than its value as a site, and of so much old iron and material.

As between lessor and lessee, whatever is affixed to the Leehold belongs to it; except that a lessee is allowed, before expiry of the lease, to remove all plant and machinery he has installed for the purposes of his business. As between mortgagor and mortgagee the case is different. A mortgagor assigns all his interest, and the mortgage therefore covers plant and machinery (unless excluded expressly, or by implication). "It is clear law that, though a fixture may be removable as between landlord and tenant, being attached so and under such circumstances as to show it to be a fixture in that sense only, and not so as to make it

permanently part of the freehold, yet it nevertheless will form part of the property subject to a mortgage of the premises, and a mortgagor cannot remove it as against a mortgagee" (Collins, M.R., in *Reynolds* v. *Ashby & Son*, 1904). The Bills of Sale Act, 1878, provided that when fixtures were "personal chattels," as defined thereby, a mortgage thereof was a subject of registration. Fixtures other than trade machinery (the term "trade machinery" being exclusive of (1) the fixed motive power, *i.e.*, water-wheels, steam-engines, boilers, etc., (2) the power-transmitting agency, *i.e.*, shafting, wheels, etc., and (3) the piping), and growing crops, were made "personal chattels" only when separately assigned; whereas trade machinery (with the exceptions above mentioned) was made "personal chattels," whether separately assigned or not. Nevertheless it was decided by the Court of Appeal (*Batchelor* v. *Yates*, 1888) that a mortgage in fee, under which trade machinery passed by reason only of being affixed to the freehold, was not an assurance of personal chattels requiring registration under the Act. With regard to growing crops, although under the Act, a mortgage of land, including the crops, does not require registration, yet if there be a subsequent severance by the mortgagor, whilst in possession, the crops are no longer covered by the mortgage, even though, under the assignment, the mortgagor be restrained from removing them. In this connection it may be mentioned, also, that, under the Market Gardeners Compensation Act, 1895, and the Agricultural Holdings Act, 1908, tenants, on going out, can claim heavy compensation against mortgagees in possession.

An *equitable mortgage* may be created by the lodgment of title deeds, accompanied by a memorandum of deposit; or by mere deposit of the deeds (whether the property be freehold, leasehold, or copyhold), or the land certificate. Whilst it involves an undertaking, express or implied, to execute a legal mortgage when called upon, it constitutes, in itself, an actual "charge" on the property, enforceable,

on occasion, by foreclosure, or by sale under the direction of the Court. The desirability of taking, at least, a written memorandum will be apparent. But when it comes to a question of realizing one's security the advantages conferred by a *legal mortgage* are considerable. Not only does a legal mortgage comprise a "power of sale" on default but in other respects it is a more "water-tight" form of security. In every-day banking practice, where advances are required temporarily, where the margin on the security is sufficient, and where the borrowers are otherwise good, equitable mortgages are freely taken; but, at the first sign of weakness, the customer should be required to execute a legal mortgage in accordance with his undertaking. For further information on the subject the reader is referred to the short work on *Title Deeds* by the present writer. This also treats of the subject of *registered land*. Registration on sale is now compulsory over the whole of the county and city of London.

With regard to "trust property," the general rule is that where an advance is made on the security thereof, without notice of the trust, and the money is diverted, the beneficiaries are postponed if a legal mortgage is given, but not so if the charge be only equitable.

Two or more owners may hold as *joint tenants*, or as *tenants in common*. The chief feature of joint tenancy is survivorship. Each, during life, has an equal share in the profits, but when one dies all his interest dies with him. It is possible, though, for a joint tenancy to be severed by any one tenant alienating his interest. The person acquiring the share would become tenant in common with the others, who, amongst themselves, would continue joint tenants of the remaining shares. In the case of tenancy in common there is no right of survivorship. Thus the share of any one tenant can be willed away; or, in intestacy, would be subject to the laws of succession. Tenancy in common also differs from joint tenancy in that the shares may be, and often are, unequal.

A *tenancy in tail* is an estate "limited" to a man and the heirs of his body. If in possession the tenant in tail has, nearly always, full power, at any time and alone, to bar the entail, the tenant becoming, by the mere act, tenant in fee simple. If a life tenant is in possession he must, generally, concur.

With regard to *copyholds*, in construction of law though not in reality, the tenant holds at the will of the lord of the particular manor. He always holds, too, according to the customs thereof. A mortgage is effected by a "surrender" to the lord to the use of the mortgagee, subject to redemption proviso. The mortgagee may be appointed attorney for the purpose of making the surrender. In practice, a mortgagee is seldom admitted except for the purpose of enforcing the security.

A mortgage of a *leasehold* may be of the whole term, or by way of sub-demise. It is usual to mortgage by way of sub-demise, as this involves no privity with the lessor. If, however, a superior lease be forfeit, a sub-lessee is liable to ejectment, although, under the Conveyancing Acts, he can claim relief in certain eventualities.

Second charges should never be taken by bankers, except as a forlorn hope. Even if there is sufficient value in the property, the banker may be robbed of his security by the operations known as tacking and consolidation.[1]

Bankers' forms of mortgage and memorandum of deposit are usually designed as "continuing securities;" but when notice of second charge is received, a line should immediately be drawn on every account affected, whether in debit or credit, including any guaranteed account where the securities are applicable to the guarantee; new accounts being opened for fresh transactions, and the old accounts being left severely *in statu quo*. The continuing character of the security at once ceases, and if the accounts be not broken accordingly, the banker may find, under the

[1] *Vide, Title Deeds*, by the present writer.

well-known rule in Clayton's case, that everything paid in, subsequent to notice, will have gone to diminish, *pro tanto*, his prior claim on the security.[1]

[1] Sir John Paget comments as follows: "On this point, *Deeley* v. *Lloyds Bank*, in the House of Lords, 1912, 29. *Times* L.R. [illegible] should be quoted, as it is the latest and highest authority reviewing and affirming Clayton's case, and showing the necessity for breaking the account to avoid the operation of the rule."

NOTE.—Under the provisions of the Courts (Emergency Powers) Act, 1914 (as amended), during the continuance of the Act, no mortgagee may exercise his powers under a mortgage dated prior to 4th August, 1914, unless he was actually in possession at that date. In the case of personal property, the power of sale must have arisen, and notice of intended sale given, prior to that date. In any case, however, the Court may make an order, on application.

CHAPTER VI

ADVANCES AGAINST SHIPS

The rules of what is known as maritime law, as administered by the Admiralty Division of the High Court of Justice, differentiate ships, in a legal sense, from all other forms of chattels. Therefore, in order to arrive at some general conclusions with regard to the qualifications of ships as security for bankers' advances, it is necessary, in the first instance, to inquire into the peculiar rules of law to which they are subject.

There are certain claims which, if established, become chargeable upon the ship herself, irrespective of ownership. A ship is liable to what is known as maritime lien: a form of lien that is very different from the common law lien, or mere right to retain possession. "It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding *in rem* relates back to the period when it first attached."[1] Thus, maritime lien is given rise to by collision at sea; and it may be enforced even after sale to a *bonâ fide* purchaser without notice. It arises, similarly, in respect of salvage services. It extends, too, to mariners' wages; and (under the Merchant Shipping Act) to a master's wages and to any of his disbursements for which the ship is liable. It may also be created by a *bottomry bond*.

When a ship is at a foreign port, and it is absolutely necessary for the master, as such, to obtain money, he is empowered to hypothecate the ship under an agreement termed a *bottomry bond*, whereby, in consideration of the advance, an undertaking is given to repay in the event of the ship terminating her voyage successfully. The lender must take the maritime risk upon himself; and the rate of interest charged is correspondingly heavy.

[1] *Vide, Personal Property*, by Williams.

bottomry bond may be made to extend to freight and cargo, as well as to the ship.

Respondentia is a contract of a somewhat like description, but it is a hypothecation of the cargo only. If warranted by the circumstances, it is enforceable, through the Court, against the cargo on the safe termination of the voyage.

In extreme cases, the master is even empowered to sell the ship and the cargo.

There are other claims, such as those for towage, and for necessaries supplied to a foreign ship, which, whilst not giving rise to maritime lien, are still enforceable through the Court; though, in such cases, the ship herself cannot be followed if the ownership has been transferred before arrest.

The ship-owner has a lien on the cargo under the incidence of general average.[1] Also under that of particular average; which arises when sacrifices are made to secure the safety of the cargo only, and not the ship.

The statutory law on the subject of ships and vessels was consolidated by the Merchant Shipping Act of 1894. There have been several amending enactments since, dealing with minor points and with fresh factors arising out of changing conditions. As amended, the Act of 1894 is our great shipping charter. It provides for the compulsory registration of, practically, all British ships. To be a British ship she must be owned, wholly, by natural-born British subjects, or by persons naturalized or denizens, who, for the time being, are resident in, or partners of a firm carrying on business in His Majesty's Dominions, or by bodies corporate subject to the laws of some part of the British Dominions, and having their principal place of business there. The registration is effected at some approved port at home, or in the colonies or possessions.

There are sixty-four shares in every ship, and no person is allowed to be registered as the owner of a fractional part of a share, although as many as five persons may be registered as joint owners of a share. A corporation may be

[1] *Vide* p. 33.

registered by its corporate name. Although no cognizance is to be taken of trusts, beneficial and equitable interests outside the register may be enforced. But the registered owner of a ship, or share therein, acquires, subject to registered incumbrances, an absolute power of disposal.

A certificate of registry will not be granted until the ship is launched and the registration completed. Any pledge of the certificate is strictly precluded. It is merely intended for the use of the master in connection with the navigation of the ship.

Any transfer of a ship, or share therein, must be in the prescribed form (termed a *bill of sale*), which must be registered at the ship's port of registry.

It may be mentioned here that most ships are also registered at Lloyds', and their names appear in Lloyds' Register, together with particulars relating to register tonnage, classification, survey, age, builders, owners (by names of managing owners or largest shareholders), port of registry, and (if a steamer) engines. Not only does registration with Lloyds' facilitate insurance, but also charterings.

The register tonnage indicates the vessel's internal capacity, the unit being 100 cubic feet of space. It is arrived at by certain measurements and calculations as laid down in the Act. From the gross tonnage certain allowances for propelling, boiler, engine and crew spaces, (averaging in the case of steamers 30 per cent. to 40 per cent.) are made in fixing the net register tonnage. It is upon the net register tonnage that dock and other dues are payable.

The weight of a ship is equal to the weight of the water it displaces (35 cubic feet of salt water weigh a ton); and the dead weight carrying capacity of the ship is the difference between the displacement when loaded and when unloaded. The dead weight carrying capacity of a steamer is some 50 per cent. to 60 per cent. more than the gross

register tonnage. These points may be useful when questions of value arise for consideration.

With regard to *mortgages* the Act provides that every mortgage of a ship or share therein, if it is to be registered, must also be made on a prescribed form, there being one form for use in connection with a fixed advance, and an alternative form applicable to a current account. Priority is according to date of record in the register and not date of mortgage. The registrar marks each mortgage with the date and hour of registration. The mortgagor remains owner subject to the mortgage. A registered mortgage of a ship, or share therein, takes precedence of a prior equitable mortgage (which can only be "off the register") notwithstanding express notice. A registered mortgagee of a ship, or share therein, is not affected by any act of bankruptcy committed by the mortgagor after registration. As previously stated, subject to prior registered incumbrances, every registered mortgagee of a ship or share therein has an absolute power of disposal. He may sell even without production of the mortgage; but no registered mortgagee other than the first may sell except under order of the Court. The first registered mortgagee, by taking possession, obtains a legal right to the freight accruing due. He may also use the ship.

There may be on the register a record of the issue of a certificate of sale or certificate of mortgage. Under such certificates the ship may be sold, or the ship, or any share therein, mortgaged, at a distant port; and any sale or mortgage thereunder will take priority in accordance with the date of the relative certificate.

No mortgage of a ship requires registration under the Bills of Sale Act, or under the Companies Consolidation Act.

A registered mortgage of a ship, or share therein, may be transferred by a registered instrument in prescribed form.

A deposit of a registered mortgage has been held to constitute a valid security (*Lacon* v. *Liffen*, 1863). It is

obvious, though, that a perfect security is not obtained thereby.

In normal times it is customary in the trade for ship-owners to give mortgages to ship-builders when the ships are sufficiently advanced to be launched and registered; and these mortgages are often accompanied by the ship-owner's acceptances in payment. There may be several acceptances maturing together, the practice being, when the acceptances are discounted, for the relative mortgage to be deposited with them; and, one bill being paid, the others are freely renewed. But, as has been said, to obtain absolute security, the only course is for a transfer of the mortgage to be registered in the banker's name, or in the names of his nominees; and, even then, it is necessary to give notice to the mortgagor, the amount owing under the mortgage (as a precautionary measure) being agreed at the same time. Short of a registered transfer, if the banker is prepared to accept the risk of fraud, a formal transfer may be indorsed on the mortgage, without immediate registration. This may be accompanied by an irrevocable power of attorney to execute and register the transfer at any moment. Time may be of importance, for it must be remembered that, until a transfer is registered, the banker cannot go into possession. Where the customer is perfectly undoubted a banker may (very exceptionally) even permit the mortgages to remain in the ship-builder's hands, resting content with a declaration to the effect that they are held in trust on behalf of all parties interested in the relative bills.

It is considered that a bill of sale is not a document of title, and an effectual security could not be obtained by mere deposit. If accompanied by a memorandum a good equitable charge would be obtained as against the registered owner; but, as before stated, not against a purchaser, or mortgagee with due registration. Nor, probably, would it hold good against a trustee in bankruptcy, the ship or share remaining in the order and disposition of the customer. (The " order and disposition " rule is not applicable

to companies.) It is only when dealing with undoubted customers that such a form of security would, for one moment, be entertained. The proper and only entirely safe course is to take a mortgage in prescribed form and get it registered forthwith.

A registered mortgage to a banker in current account form is sometimes accompanied by a separate document (off the register) embodying such detailed stipulations as may be agreed upon. The validity of the registered mortgage is not affected thereby. Such a document will, generally, provide for payment on demand, and the security will be made applicable to all liabilities, alone and joint, in whatsoever way arising. It may include a covenant by the mortgagor to maintain the ship, engines, etc. It would also set out the conditions under which the security was to become enforceable, and would define the powers of the banker or his nominees when in possession, including, perhaps, a right to add to principal the costs of any attempted sale. Similarly, power would be given to the banker to insure, adding costs to principal, if the mortgagor failed to do so.

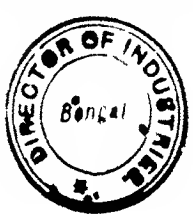
When a current account form of mortgage is held, and notice is received of a second registered mortgage, Clayton's Rule is applicable.

If a banker holds less than thirty-three shares out of the sixty-four, his position cannot be regarded as satisfactory, for the reason that, whilst all shareholders are liable for the debts in which a ship may become involved, the management of the ship is in the hands of the majority; although the Court may be moved to intervene. Also, for the same reason, it may be difficult to obtain a fair price for a minority holding.

Marine policies are comprehensive instruments: they may be procured to cover practically all the risks to which a ship is liable. It is most important to see that, where shipping interests are involved, full insurance is effected. As a rule, a banker will require all relative policies to be

lodged or assigned. In the case of policies of Mutual Protection Associations certain formalities as to notice, etc., require to be strictly observed.

Facilities to ship-builders, such as have been indicated above, may, within bounds, be regarded as entirely legitimate, as being temporary in their nature and strictly in support of industry. Fluctuating advances to owners on the security of ships, assuming such advances are in character with customers' capital and with the extent of their business, may be similarly regarded. Ships are always saleable at a price, even in normal times; and, from the point of view of security, such accommodation can usually be afforded with reasonable safety. Undue risks, however, either with regard to the amounts involved, or in connection with the form the security takes, are to be deprecated. The shipping industry is notoriously in a state of flux at the present time. For reasons universally recognized, prices during the war rose phenomenally. With falling freights a reaction has begun. How quickly the process will be accentuated by home and American production must be largely a matter of conjecture. There is, of course very considerable lee-way to be made up; and, with labour difficulties and the high cost of materials, the reaction may be partially arrested, or wholly stayed, for a while. Be that as it may, it is patent that the situation calls for the exercise of extreme caution on the financial side.



CHAPTER VII

ADVANCES AGAINST GUARANTEES

ADAM SMITH, in his *Wealth of Nations*, referring to the subject of the cash credit system, which had then come into vogue in Scotland, writes as follows: "The commerce of Scotland, which at present is not very great, was still more inconsiderable when the two first banking companies were established; and those companies would have had but little trade had they confined their business to the discounting of bills of exchange. They invented, therefore, another method of issuing their promissory notes, by granting what they called cash accounts, that is by giving credit to the extent of a certain sum (£2,000 to £3,000, for example) to any individual who could procure two persons of undoubted credit and good landed estate to become surety for him, that whatever money should be advanced to him, within the sum for which the credit had been given, should be repaid upon demand, together with the legal interest. Credits of this kind are, I believe, commonly granted by banks and bankers in all different parts of the world. But the easy terms upon which the Scotch banking companies accept of repayment are, so far as I know, peculiar to them, and have, perhaps, been the principal cause, both of the great trade of those companies, and of the benefit which the country has received from it."

The recognition of guarantees as a convenient form of bankers' security long since extended to England, and, usually by way of continuing security, they are availed of by different classes, very generally, at the present time. Many old-fashioned bankers have preferred to discount a promissory note made by the principal and surety jointly and severally, and payable so many months after date, with the idea of accentuating the fact that the loan was granted for a definite period only. It is doubtful though,

whether, in actual practice, much advantage accrues from the adoption of this method. In other circumstances they have chosen to hold (without discounting) a joint and several promissory note payable on demand. In such case the security is construed as a "continuing" one, even when unaccompanied by a separate agreement. In both connections promissory notes are now rapidly falling into disuse, the great advantages of having, instead, a guarantee with the usual clauses, becoming generally appreciated.

Guarantees by well-to-do relatives of customers, or by personal friends in possession of substantial means, where the banker is satisfied that any claim thereunder would not seriously embarrass the guarantor, and the advances contemplated are otherwise desirable, may be regarded as a satisfactory form of security. It frequently happens that there is a business motive behind a guarantee, as where a director guarantees the account of his company. Where an advance is made to a small trading company, a director should be required, as an earnest of good faith, and as a matter of principle, to give his guarantee. He is behind the scenes and can judge better than the banker how things are going. If he does not feel sufficiently confident to back his own venture it is hardly reasonable to ask the banker to grant accommodation. Again, a guarantee is sometimes given to assist a customer in carrying through some particular transaction from which the guarantor derives a direct benefit. Or a person may lend his name by reason of his having an interest in a private business or undertaking. Similarly, wholesale people may deem it politic to guarantee the account of a customer of their own, from whose business success they are likely to derive material advantage. Nor are instances unknown where successful men, of large substance, acting purely from altruistic motives, have adopted this means of unostentatiously assisting deserving *protégés* at the beginning of their commercial careers. All such guarantees as have been indicated

above are quite correct in principle, and, subject to other considerations, may be looked upon as entirely eligible banking propositions.

It should be added that it is always a question for serious consideration by a banker how far he should allow an outsider, especially one unfamiliar with business methods, to guarantee an account.[1] *A banker should be able to read the motive; and beyond this, he should be reasonably satisfied that the guarantor understands what he is doing.* He must deal honestly in the matter. If he is a party, even passively, to any concealment of material facts, a knowledge of which, by the surety, would have caused the latter to hold his hand, the guarantee might thereby be invalidated. The test will be whether he acted as he might reasonably have been expected to act. As Lord Chancellor Cranworth observed, in the case of *Owen* v. *Homan*, 1853: "If the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used to obtain such concurrence, he is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject."[2]

The experienced banker will also be on his guard against the possibility of any collusion in fraud. It is quite possible, for instance, that a guarantor might be on the point of putting everything into a marriage settlement. Marriage being a good consideration, the creditors are liable to be defeated. The very money the bank advanced might be diverted in this way.

[1] Sir John Paget observes: "There are some pertinent remarks as to this in *Birmingham District and Counties Bank* v. *Lowry*, Court of Appeal, 25th January, 1905, reported in the *Morning Post*, 26th January."

[2] *Vide*, *National Provincial Bank* v. *Glanusk*, 1913, which case shows that the non-disclosure of a mere suspicion of fraud might not invalidate a guarantee. Horridge, J., said: "I do not think on the authorities there was any duty on the plaintiffs to communicate to the defendant the fact, if it was a fact, that Coles (the principal debtor) was defrauding him; nor do I think that upon the facts there is any satisfactory proof the plaintiffs were so suspicious."

There is another thing that the law takes cognizance of, namely, undue influence. Thus, it is dangerous to rely on the guarantee of a woman, especially on that of a customer's wife, unless she be separately advised. The average woman is proverbially unbusinesslike, and the possibility of ever being called upon, under a guarantee, might never present itself to her mind in concrete form.[1] Moreover, there is generally a restraint on anticipation of a married woman's income under a settlement; although, in the event of bankruptcy, the Court is now empowered to get at such income to a limited extent.[2]

Persons whose incomes die with them should not be accepted as guarantors. Such are annuitants and pensioners, and many of the salaried class, including service men and clergymen. Amongst these may always be found a considerable sprinkling of kindly-natured persons, who, lacking business training, are peculiarly liable to be imposed upon, and whom it is almost necessary to save against themselves. Even if such a person were taken, exceptionally, and for a small amount, it is quite likely, in the result, it would prove to be not the only transaction of the sort to which the obligant had become committed. As Rae says, in his *Country Banker*, it is well in such matters to preserve "a business conscience void of offence."

The ideal guarantee is one that is supported by good collateral security. Short of this, unless he is absolutely certain from his own knowledge that a proposed guarantor is good, a banker should be satisfied with nothing less than a brother banker's unqualified opinion. He would naturally be suspicious of an opinion that was hedged about and guarded. And, inasmuch as everyone, especially if in business, is more or less liable to sudden losses and calamity, inquiries should be renewed at frequent and regular intervals. It is futile to rely on rumour in a matter of this

[1] *Vide, Bank of Montreal* v. *Stuart and Another*, 1910.
[2] *Vide*, Bankruptcy Act of 1914.

sort. It is of the quality of rumour to be hyperbolical. One has heard it said that a man never takes anything with him when he dies, but on a will being proved people are often left to wonder what then can have become of the departed's reputed wealth.

This does not purport to be a treatise on securities, but all reference to the distinguishing features of a banker's ordinary form of guarantee cannot well be avoided in any review of the subject of banker's advances. It is therefore proposed to take, *seriatim*, the clauses of what is now becoming practically a common form, and to point out, as concisely as may be, the effects of their elimination. For further information the reader is referred to Mr. B. Campion's admirable lectures on the *Law of Bankers' Guarantees*, delivered before the Institute of Bankers, as reported in their *Journal* for 1909.

In the first place there must be a consideration "of some value in the contemplation of law,"[1] although not necessarily expressed. It is usually expressed in wide terms.

Then, the agreement is to pay "on demand." This prevents the statutory limitation from beginning to run until demand has been made. (Contrast *Parrs Banking Co.* v. *Yates*, 1898, with *Bradford Old Bank* v. *Sutcliffe*, 1918.) In practice, bankers, nevertheless, require guarantees to be renewed, or acknowledged, before the expiration of the six years.[2]

In the next place the agreement is to pay *all* liabilities, present and future, with a limitation as to the amount. It is expressed in such terms as follows—

"All moneys now due and owing to you from the principal debtor, or for which the principal debtor may

[1] *Vide*, *Mercantile Law*, by Smith.

[2] Sir John Paget comments as follows: "*Parrs* v. *Yates* was cited by Swinfen Eady, J., in *Ascherson* v. *Tredegar Dry Dock & Wharf Co.*, 1909, 2 Ch., 406. *See* also *In re Clough*, 31 Ch. D. on p. 326; and *Glegg* v. *Bromley*, 1912, 3 K.B., 477. The course suggested of requiring guarantees to be renewed every six years is in any case desirable."

hereafter become liable[1] to you on any account, whether alone or jointly with any other party or parties, or in any other manner whatsoever, including interest, commission, and usual bankers' charges; provided nevertheless that my liability under the guarantee shall be limited to——pounds with interest at 5 per cent. from date of demand."

If the guarantee is not made to extend to *all* liabilities, the guarantor may, by paying the amount to which his guarantee is limited, be entitled, so far, to take dividend in the event of the principal debtor's failure. It is not essential to the validity of a guarantee to have any limitation as to amount, and occasionally a guarantee is unlimited.

To meet the case of any possible change in the composition of a customer firm, a provision is sometimes inserted to the effect that the guarantee shall continue in force notwithstanding any such change. But, in practice, it is well, on the happening of the event, to break the account, pending the completion of fresh arrangements.[2]

There follows a condition as to termination by the guarantor. The agreement is to remain in full force as a continuing guarantee until so many months after notice. The banker is given breathing time in which to consider

[1] Sir John Paget comments as follows: "I do not like the words 'become liable.' They are not, however, so open to criticism as 'debt due or owing' and the like. (In *The Law of Banking*, 2nd ed., p. 372, Sir John Paget points out that the bankruptcy of the principal debtor precludes the debt from being due, or owing, and suggests "all moneys advanced to or paid for or on account of the principal debtor and interest thereon remaining unpaid or until repayment thereof," or words to that effect.)

[2] In the event of the amalgamation or absorption of the bank it would appear to be necessary to break the account, unless the form of guarantee provides otherwise. In the case of *Bradford Old Bank* v. *Sutcliffe*, in the Court of Appeal, 1918, where a guarantee had been given to the plaintiff bank, who subsequently amalgamated with the United Counties Bank, Pickford, L. J., said: "In either case the transferee of the debt, whether by novation or assignment, is the person with whom the surety has to deal, and, as the liability is already ascertained, it is a matter of no consequence to whom he has to pay it." (*Note* the liability was on a dormant loan account throughout.)

his position and to decide on his course of action. It is considered, nevertheless, in view of *Lloyds v. Hughes*, 1880, that receipt of notice may have the effect of determining the continuing nature of the guarantee; and, in practice, bankers always break the account immediately. It would be a risky proceeding though to dishonour cheques drawn before the customer were communicated with, if the banker would have paid the cheques but for the notice. The account should be broken similarly in the event of the guarantor's death, even if there be a provision that the guarantee should continue in full force till so many months after notice by the personal representatives; and this, notwithstanding Mr. Justice Bowen's dictum in *Coulthart* v. *Clementson*, 1879, which seems to suggest otherwise.[1] As to a banker's right to break an account, see *In re Sherry, London and County Bank* v. *Terry*, 1884. Of course, when a line is drawn, the liability of the guarantor, or his estate, will not be determined after the expiration of the time limit agreed upon, so long as any moneys secured by the guarantee remain unpaid and the liability is not statute-barred.

Another condition imported is to the effect that the banker may deal with other securities, present or future, without the liability under the guarantee being affected. In common law a surety has a right to the proceeds of securities over and above the amount of the customer's actual liability at the time the guarantee was signed.[2]

And again, there will be a provision that the banker may, at his sole discretion, give time or indulgence to the principal debtor or any other party (*e.g.*, a party liable on a bill); and similarly to compound with the principal debtor, or any other party. To do these things without the assent of the guarantor, in common law vitiates a guarantee (*Perry* v. *Nat. Provincial Bank*, 1910).

[1] So, in the event of a guarantor's insanity, a line should be at once drawn on the account, as the continuing nature of the guarantee ceases. (*Vide, Bradford Old Bank* v. *Sutcliffe*, 1918.)

[2] *Vide, Leicestershire Banking Co.* v. *Hawkins*, 1900.

There remains for consideration the ultimate or dividend clause, which is often of considerable value to a banker. In the event of bankruptcy, or proceedings analogous thereto, the banker is given the right to prove on the whole debt, and to look to the guarantee for the ultimate balance after receipt of dividends. There is a specific waiver in the banker's favour of all right to prove so far as may be necessary to enable the banker to get payment in full. Also of the actual dividends, as and when they are received, and of the benefit of other securities. Should a guarantor desire to pay the amount of his liability it should be placed to a "suspense" account, if the banker desires to preserve his rights under the dividend clause. As to the right of a banker to adopt this course, see *Yorkshire Banking Co.* v. *Thomas*, 1896, in which case it was decided that the clause held good notwithstanding the guarantee was delivered up (the amount having been paid and placed to suspense), and notwithstanding, too, that no liquidation petition had been filed before the date of payment. Contrast this decision, however, with that in *Mackinnon's Trustees* v. *Bank of Scotland*, 1915. This was a Scotch case. The guarantee had been destroyed, and the Court held that its terms, therefore, could not be proved in the bankruptcy proceedings, which ensued eighteen months after the money had been paid by the guarantor. The case was decided against the bank, apparently on broad general principles. From this it would appear to be desirable to retain the guarantee, even if cancelled; and if it is not agreed, in writing, at the time, that the money is received without prejudice to the banker's rights under the guarantee, it is, perhaps, unwise to continue the position indefinitely. Nevertheless, it is difficult to discern how, under such an agreement in the guarantee as that outlined above, the banker's rights could be ousted according to English law, more especially if, as is sometimes done, the banker is further specifically empowered by the terms of the guarantee to place such

sums in suspense, to be appropriated entirely at its own discretion.[1]

The form of agreement that has been considered contemplates one obligant only. But, sometimes, two or more persons become obligants under a banker's form of "joint and several" guarantee.[2] The guarantors jointly, and each of them, become liable to the extent, in the whole, of the amount to which the guarantee is limited, and they can be sued, on occasion, in any way the banker pleases. Also, if one of the guarantors dies, his estate is not released, provided a line is drawn on the account. It would be otherwise were the guarantee joint only.

In taking the guarantee of a firm all the members should be required to sign, as generally one member has no implied authority to bind the others by this means. And as regards a company, the question will have to be looked into as to its powers under its constitution.

When securities are lodged collaterally to secure another person's account, unless accompanied by a separate guarantee, a special form of charge is taken, by which it is agreed that the securities shall be regarded in the same light as is the personal security under a guarantee. Practically identical clauses so far as they are applicable are inserted. No personal liability outside the securities need, necessarily, be imported.

In the event of the failure both of a principal debtor and of a surety, a banker may, in respect of a guarantee, prove against the estate of the latter without regard to any security held from the principal debtor. But if a dividend on the principal debtor's estate has been paid, or even declared, prior to proof on the surety's estate, then the amount of such dividend must be deducted from the proof.

[1] Note by Sir John Paget: "Cf. *In re Sassa*, 1899, 2 Q.B. 12."

[2] Sir John Paget comments as follows: "The guarantee should always be joint and several; and it should be provided that neither the death of nor determination by one or more of the co-guarantors shall release the others or other."

CHAPTER VIII

ADVANCES AGAINST DEBTS

It is not in accord with the usual practice of bankers to make advances against the security of trade debts. The risks involved are too great; nor does a banker care to be placed in the invidious position of debt-collector. It is a class of business that appeals rather to professional money-lenders, who, naturally, do not neglect to take its risky character into consideration when arranging their terms. An assignment of book-debts is strongly suggestive of impecuniosity; and, indeed, is usually regarded as removed but a few degrees from that last resort of the hopelessly involved, a bill of sale. Nevertheless, a banker may, incidentally, through the medium of a debenture, acquire a floating charge over the book-debts of a limited company. This is an entirely different sort of proposition, and will be considered in the following chapter. Also, a banker may, in certain circumstances, properly take an assignment of moneys payable from some particular fund; as, for instance, a legacy under a will, or an interest in a trust, or, exceptionally, of the payments due under a specific contract.

During the continuance of the war, bankers lent freely against the assignments of Government contract moneys. They took broad views of their public responsibilities, and acted in a thoroughly patriotic spirit. In connection with the process of reconstruction, it may be presumed there will be many large Government contracts to be placed in the near future; and it is impossible to foresee what may be the outcome of the movement for closer control of industry; but it is fairly obvious that calls on bankers in the direction indicated may continue indefinitely. It is therefore fortunate that, at this juncture, we have in our midst a number of big banks, with huge resources, able and willing to act as occasion may justifiably demand.

The Judicature Act, 1873, Section 25, enacts as follows—

"Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."

To come without question within the section the assignment must be of the whole debt[1], and notice is incumbent. A mortgage in the ordinary form is regarded as an absolute assignment within the meaning of the section, whether for a fixed sum or as a continuing security.

Debts were assignable, in equity, prior to the passing of the Act, but the debtor, unless he was an asserting party, could only have been sued in the assignor's name (the assignor was estopped from denying the right of the assignee so to do). The position with regard to equitable assignments remains unchanged. If a mortgage, for want of notice, does not fall within the section, it is still good in equity.

In order to constitute a valid assignment for valuable consideration any form of wording may be used, provided the intention is clear, and the fund or debt is sufficiently indicated. It will be equally effective if it takes the form of an order addressed to the debtor. Even future debts,

[1] Sir John Paget comments as follows: "This is a point on which there has been great divergence of judicial opinion, and it cannot be regarded as settled that part of a debt cannot be assigned.

Authorities that part *can* be assigned only: Darling, J., in *Skipper* v. *Holloway*, 1910, K.B. 630. In equity, *Durham* v. *Robertson*, 1898, 1 Q.B. 765. That part *cannot*: Bray, J., in *Foster* v. *Baker*, 1910, 2 K.B. 636. Court of Appeal declined to decide. *Hughes* v. *Pump Room Hotel*, 1902, 2 K.B. at p. 195."

that are capable of identification, may be assigned. Although, save for the purpose of the section, notice is not essential, it is desirable, as in its absence there is nothing to debar the debtor from paying, in good faith, to the assignor. He will do so at his peril after notice. Again, in the absence of notice, a mortgage given in conformity with the section might gain priority. In the case of a debt arising in the course of a man's trade or business, notice is requisite to take the debt out of the effect of the "order and disposition" clause. All assignments are subject to equities, including the right of set-off. If the debt is payable by instalments under a contract, in the event of bankruptcy the assignee takes the instalments so far earned (subject to equities).

With regard to book-debts the Bankruptcy Act provides that an assignee shall lose all right to any such remaining unpaid at the commencement of bankruptcy proceedings against the mortgagor (being an individual or firm), in the absence of registration[1] of the assignment within seven days of its date, except those due at the date of the assignment, from debtors therein specified, or, as at the same date, growing due under a specific contract therein mentioned. And as regards charges on book-debts by limited companies, to be effectual it is required, under the Companies (Consolidation) Act, that these be registered[2] within twenty-one days.

When a legal assignment is taken it is well to insert a clause providing that it shall not be incumbent on the banker to sue. Otherwise he may be accounted liable for neglect in the exercise of his remedies. A similar clause should be introduced in any mortgage of a mortgage debt.

Life policies are *choses in action*, and, as such, may conveniently be referred to in connection with the subject of this chapter.

[1] At the central office of the Supreme Court, as in the case of bill of sale.

[2] With the Registrar of Joint Stock Companies.

The addition of a life policy is sometimes necessary to the perfection of a security, as where deeds are taken of property in which a customer has only a life interest, or where a security is contemplated in respect of which a customer's interest is contingent on survivorship. And, in other circumstances, it may be deemed desirable to require the lodgment of a life policy. Take the case of a man of moderate means engaged in a business, the continued success of which appears to be dependent upon the exercise of his own special knowledge or abilities. It is not suggested that, merely because a customer is so situated, therefore it is necessarily right to make him advances against the security of a comparatively new policy. Yet instances conceivably may, and, in practice, actually do arise, where the lodgment of a policy becomes the deciding factor in the question of an advance.

Other things being equal, a policy in a leading office constitutes quite a satisfactory form of security, to the extent of approximately the quoted surrender-value, especially if it has been in existence and in full force many years. As one result of the war, bonuses have been reduced or entirely withheld, and increments in surrender-values will doubtless be affected to some extent in consequence. But, speaking generally, the depreciation in the value of life policies has been very slight, and, in view of the particularly trying experience of life offices, it must be admitted that this is a great point in favour of life policies in any estimation of their eligibility as a form of banker's security. Moreover, where the security is properly taken, a policy, after it has been in force a few years, is easily realizable. It is necessary, of course, to have regard to the terms of any particular policy, and to be sure the whole interest therein is made subject to the mortgage, as in the case where a wife has an interest. Again, there may be a restraint on assignment, and, in fact, this is usual with Industrial policies.

The proper way to make a security of a life policy is by

way of legal assignment, with notice. There should be embodied clauses empowering the banker to pay premiums and add them to principal, and also to surrender. But an equitable charge may be created by writing, or by mere deposit.

The Policies of Assurance Act, 1867, enacts that when notice is given (and not before) the legal assignee may sue in his own name; and that the date notice is received shall regulate the priority of all claims under any assignment. But this provision is not intended to affect the rights of outside persons. See *West of England Bank* v. *Batchelor*, 1882, where a solicitor had a lien over a policy, and the insured got an advance from the bank on a legal mortgage (with notice), under the misrepresentation that the policy had been lost. It was held that the bank were saddled with notice that the policy had been dealt with. "As a general rule," observed Fry, J., "the assignee of a *chose in action* takes subject to all the equities, and therefore, *primâ facie*, the bank took subject to all the equities. It appears to me that that is in no way altered by the Policies of Assurance Act or by the provisions of the Judicature Act."

CHAPTER IX

ADVANCES TO COMPANIES AGAINST THEIR DEBENTURES

As a banker is fully justified in making advances for business purposes to an individual or a firm against the security of produce, deeds, or investments, so may he be warranted in granting accommodation to trading corporations against the security of their available assets. Apart from the fact of the liability of a trading company's members being limited, there is little in principle to differentiate such a business association from an ordinary trading partnership. From the legal point of view, however, the borrowing powers of companies may be circumscribed; whilst, on the other hand, companies usually possess, to some extent, at least, the capability of securing loans by the comparatively modern, but sufficiently well-established, device of a debenture issue, constituting a floating charge over the whole of the undertaking.

In the case of a big company its debenture issues are usually taken up, and held, by the public. These issues are commonly regarded as part of the company's capital, but, in reality, of course, they are so much secured debt, ranking before the ordinary shareholders, before the preference shareholders, and before the general creditors. A banker will sometimes take up a block thereof as a temporary expedient, pending, it may be, the arrival of a favourable moment in market conditions for placing with investors. But, with regard to smaller companies (many of which are "private"), a banker, not uncommonly, makes advances against a single debenture, or the whole of a series, created avowedly for the purpose of affording him security. How far a banker should go in this direction depends upon a diversity of considerations. No two

cases are ever quite alike. There must always be a due sense of proportion. Thus a permanent inelastic advance of £5,000 to one company with a small turnover, even against a well-secured debenture, is wrong in principle, whereas a debenture-covered overdraft fluctuating between £50,000 and £150,000 of a successful company of ample resources, the returns on the account being entirely satisfactory, might be regarded as beyond criticism.

In considering any application for accommodation of the character now under review regard should be had, amongst other things, to the extent of the company's capital, paid-up and uncalled; to the history of the business; to the management; to the reserves; and to the nature of the assets which would form the basis of the banker's security. A banker does not make advances to a company against its debentures if the risks of having to appoint a receiver to protect his interests are other than remote. Bankers take debentures as they take other forms of security, to guard against possible vicissitudes. Again, an invidious position arises when it becomes apparent that a business is being conducted mainly in the interests of debenture-holders. A primary requisite, therefore, is an ample margin in liquid assets. There should, indeed, be sufficient assets existing in liquid form to discharge all liabilities, including trade creditors; and, generally speaking, trade creditors should not be largely in excess of trade debtors. For reasons explained in Chapter V, factory property, works, and machinery, do not, as a rule, constitute satisfactory cover, and in estimating the position in the generality of cases, little heed should be taken of them. In any properly managed concern something like 10 per cent. per annum is written off machinery and plant, if not directly, then by way of an accumulation on reserve account, against the time they have to be "scrapped." There is also a liberal allowance for depreciation in buildings. A banker will require to know what has been done in

these directions. Has a particular business been financed on proper lines? Have profits been fully distributed, or reasonably conserved? Another pertinent question just now relates to excess profit duty. Has full provision been made for this? Then much will depend on the industry involved. Is it of a class that is well-established, or is it of one that is speculative, or declining? Reference has also been made above to the question of management. Is the continuity of capable management assured? After careful consideration of all points a banker might not care to sanction an application without the covering guarantee of the directors. If he has any doubt whatever about the absolute safety of an advance, this should be made a *sine qua non;* and in all dealings with small companies it is usually stipulated for.[1]

The question of borrowing powers has already been mentioned.

The "memorandum of association" is the charter of any company registered under the Companies Acts; and it is by this, actually or impliedly, that borrowing powers are conferred; although the powers so conferred may be limited by the "articles of association." (As regards the latter, in cases where Table A is adopted in its entirety, the borrowing powers, under clause 73, are not to exceed the issued share capital of the company, without the sanction of the company in general meeting.) Consonantly with the memorandum (not further) the articles may be altered by special resolution in general meeting. Moreover, an advance made merely *ultra vires* of the director's powers, as limited by the articles, may be effectually ratified in general meeting by adoption of the liability (*Irvine* v. *Union Bank of Australia*, 1877).

Unless the power is expressly excluded or limited by the memorandum or articles, or by the special act of parliament under which a company may have been incorporated, a trading or commercial company has an implied power to

[1] *Vide*, p. 83.

borrow, and give security, to any reasonable extent, for the purposes of its business.

Bankers' advances are regarded as borrowings; and, in the event of a non-trading or non-commercial company that has no express borrowing powers, overdrawing, such overdraft, as being *ultra vires*, will, upon a liquidation, generally be postponed to the claims of the ordinary creditors, and it may be, to some extent at least, to those of the shareholders as well. It is a little doubtful how far a relative guarantee would be valid, unless a clause were inserted in the guarantee extending it to liabilities incurred *ultra vires*, though such a clause would probably not be necessary in the case of a guarantee given by the directors of the company. In dealings with bodies with limited borrowing powers it is well for advances to be on separate loan account. If on current account, although within borrowing powers in the first instance, inasmuch as the advance would constantly be undergoing the process of recreation, ultimately it may prove to be outside borrowing powers.

Trade debts, as distinct from bankers' advances, are not borrowings; and where advances made *ultra vires* had been applied in payment of trade or other legitimate debts it was long since held that a banker could, under the doctrine of subrogation, claim to stand in the place of creditors so paid and recover as against the company or other body. Also, that if a banker could show that a specific sum lent to a company, or other body, with exhausted borrowing powers, had been invested in a security which could be identified, he could follow his money into that security.

In the case of *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society*, 1884 (House of Lords), it was decided that, as the society had no borrowing powers, the bankers' overdraft was *ultra vires*, and that the bankers could only recover in so far as advances had been applied by the society in payment of debts legally due

from the society.[1] Then in a subsequent case, in 1885, *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.*, the Court of Appeal took a further step, and held that the liquidator of the society could recover from the bankers money paid into the banking account and appropriated in discharge of *ultra vires* advances.[2] But these cases must now be read in the light of the Birkbeck Bank case, *Sinclair* v. *Brougham*, 1914 (House of Lords), where it was decided that, upon a liquidation, after the *intra* vires creditors had been satisfied, and subject to the right of any individual to follow his own money into assets that could be identified, *ultra vires* creditors had the right to follow their money into the general assets. In this particular case it was held that the *ultra vires* creditors (the depositors) and the unadvanced shareholders were to take *pro rata*. In different circumstances *ultra vires* creditors might be postponed to shareholders. But opinions were delivered by the law lords to the effect that in no circumstances should shareholders be allowed to benefit inequitably where claims by *ultra vires* creditors were concerned. Moreover, that the equity involved in the decision was not necessarily confined to a liquidation—that, in fact, the decision of the Court of Appeal in the *Cunliffe Brooks & Co.* v. *Blackburn Society*,

[1] Sir John Paget comments as follows: "The Court of Appeal had held that the bankers were not creditors of the Society for overdraft, the borrowing having been *ultra vires*, but were entitled to hold deposited deeds as security for repayment of so much only of the moneys advanced by them as was applied in payment of the debts and liabilities of the Society properly payable and had not been repaid to the bankers, excluding payments to withdrawing members. The House of Lords, without expressing any opinion upon the question of payments to withdrawing members or the bankers' right to hold the securites, held that the decision of the Court of Appeal was in other respects right."

[2] Sir John Paget comments as follows: "The bankers were, however, allowed to stand in the place of withdrawing members who had been paid out of advances made by the bankers, and to receive the amounts which would have been payable to such members if they had not been paid off, and also the benefit of securities obtained by the Society by means of the overdraft without being postponed to other securities granted to the Society in respect of advances out of its proper funds."

1885, case was wrong, as the society had only returned to the bankers the latter's own money.[1]

It is generally understood, and the view is supported by legal decisions, that corporations created by royal charter have unlimited borrowing powers, even where the charter directs otherwise. But this way litigation looms.

With regard to public utility companies constituted by acts of parliament, *e.g.*, Tramway, Water, Gas, and Electric Lighting Companies, it is not practicable to create debentures conferring a power of sale. A receiver may be appointed only in respect of earnings. The borrowing powers of such companies may be dependent on the amounts of capital issues, and restricted in their form to mortgages

[1] Sir John Paget comments on *Sinclair* v. *Brougham* as follows: "In that case a building society started a banking business as the Birkbeck Bank and as such received deposits. The House of Lords held that the borrowing powers of the Society were confined to its legitimate objects, and that receiving such deposits constituted *ultra vires* borrowing; that the depositors could neither in law nor equity claim their money back as money lent or money had and received.—But that being *ultra vires* lenders, they were entitled, after outside creditors had been satisfied, to what is known as a 'tracing order,' enabling them to follow their money into the assets of the Society so far as it could be identified in specie or investment; and that, subject thereto the remaining assets of the Society ought, in winding up, to be distributed *pari passu* between the depositors and the unadvanced shareholders according to the amounts respectively credited to them in the books of the Society at the commencement of the winding up. *Blackburn District Society* v. *Cunliffe Brooks* had been cited in argument, and the House of Lords held that that case, in so far as it was adverse to the bankers, was wrongly decided. The money paid to the bankers in discharge of the *ultra vires* loan could not be recovered from them, unless there was proof by the Society that the money advanced by the bankers had been lost and could not be repaid, and that the Society by the fact of repayment had made an admission to the contrary effect. That in the absence of such evidence, the Society must be regarded as having simply returned to the bankers their own money. But the House of Lords did not disturb or differ from the other part of the judgment which allowed the bankers to stand in the place of legitimate creditors who had been paid off out of the *ultra vires* advances. On the contrary Lord Parker lays down this principle in the strongest and fullest terms, basing it either on the doctrine of subrogation or on the ground that the contract of loan is validated to the extent to which the borrowed money is so applied, there being to that extent no increase in the indebtedness of the company, in which case if the contract of loan involves a security for the money borrowed, the security would be validated to a like extent."

or debentures. Under war conditions it has been found impossible to get capital subscribed, and bankers have, broad-mindedly, responded to applications for *ultra vires* advances to a far greater extent than would be justifiable in normal times.

If the directors of a company have held out that they were duly authorized to borrow, and such borrowings have proved to be *ultra vires*, they may be held personally liable under a breach of warranty of authority. But the mere signing of cheques on behalf of a company does not amount to a warranty of authority.[1]

The power to mortgage, or create debentures, is not always co-extensive with general borrowing powers. In every case close investigation of all particular powers is therefore necessary.

An ordinary debenture constitutes a charge over the undertaking and all its property, present and future, including the uncalled capital, to the intent that the charge shall be a floating security only. But as regards freeholds and leaseholds, there is sometimes embodied a specific charge. With big concerns debenture issues are usually supplemented by a trust deed. The realty is conveyed, and the other assets charged, to the trustees, as security, on behalf of the general body of debenture or debenture stock holders.

A floating charge on present and future assets is one that contemplates the company carrying on its business in the ordinary way, involving changes in the assets, until some stipulated eventuality shall have arisen, when the floating charge will become a fixed charge.[2]

All debentures, and all mortgages and charges except as appears below, require registration with the Registrar of Joint Stock Companies within twenty-one days.[3] If the security fails on account of non-registration, the obligation to repay matures at once. The twenty-one

[1] *Vide, Beattie* v. *Lord Ebury*, 1874.
[2] *Vide, In re Yorkshire Woolcombers Association, Ltd.*, 1903.
[3] *Vide* Companies (Consolidation) Act, 1908.

days run from the creation of the security, whatever may be the date inserted.[1] Securities over stocks and shares, goods or the mercantile documents representing them, life policies, and ships, do not require such registration. Every mortgage and charge, however, must be entered in a company's own register. Previous to the Act of 1900, debentures did not require public registration; nor did mortgages or charges on realty before the Act of 1907.[2]

When a debenture is being taken by a banker the agreed date of repayment is not very material, inasmuch as, were he to levy execution, he would, under the conditions universally adopted, be in a position at once to appoint a receiver.[3]

It is usual for debentures to be issued to trustees, nominees of the banker, under an agreement giving them, on occasion, power to sell the debentures and out of the proceeds to repay the amount due to the banker whether on current account or in any other way. The overdraft, in such case, is regarded as being distinct from the debenture issue. Moreover, when debentures are lodged in this way, under the Act they will not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited. Nevertheless, if the banker had notice of a further charge on the particular debentures, it would be necessary to break the account in order to preserve priority.

The Act provides for the re-issue of debentures in certain circumstances. There must be no prohibition either in the debentures themselves, in the articles, or in the conditions of issue. And this is not enough. There must be some evidence of intention of keeping them alive. The banker's solicitor should always be consulted in such cases.

By a further provision of the Act, a floating charge by

[1] *Vide, Esberger* v. *Capital and Counties Bank*, 1913.

[2] Under section 12 of the Act a return was required of the totals of such mortgages or charges previously created.

[3] *Vide*, Courts (Emergency Powers) Act, as affecting pre-war securities.

the company, created within three months of the company being wound up, unless it is proved that the company was solvent immediately after the charge was created, is invalid except to the extent of fresh advances made on the strength of the security.

It is scarcely necessary to point out that great risk is incurred in making unsecured advances to heavily debentured companies. What is the position if such a company tenders security?

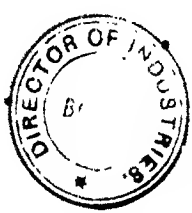
A floating charge may be simple or restricted. A simple floating charge does not prevent a company, in the course and for the purpose of carrying on its business, from creating a charge on a specified asset. But "it is not uncommon to insert in the instrument creating the charge (*i.e.*, the floating charge) words to the effect that the floating charge is *not* to authorize the company to create any mortgage or charge ranking in priority to or *pari passu* with the debentures, and this qualification is for the most part effective."[1]

In different cases it has been held that, even so, a subsequent legal or equitable mortgagee of a specified asset may obtain priority if he cannot be saddled with notice of the restriction. Some of these decisions, however, were before the Act of 1900, under which public registration of debentures was instituted; although, in the case of *The Standard Rotary Machine Co.*, 1906, it was held that registration did not *per se* saddle the banker with notice of the registration, inasmuch as the conditions did not appear on the register. Nevertheless, it must be recognized that existing statutory requirements relating to registration are, as a whole, distinctly wide; and there remains some feeling of doubt as to whether, in a future case of but slightly different complexion, a banker may not be held to have been put on inquiry. With a company showing a good balance-sheet doubtless a banker would be justified in the everyday course of business in advancing,

[1] *Vide Company Law*, by Palmer.

without investigation, against specific charges on assets such as shares or mercantile documents; but hardly so if the position disclosed by the balance-sheet were less satisfactory, or the extent of accommodation required were at all considerable or other than temporary in character.

In the case of *Connolly Bros., Ltd.*, 1912, where a person had, as against the deeds, lent to a company with an existing duly registered debenture issue, creating a restricted floating charge on all present and future property, to enable them to settle for the purchase, it was held that what the company acquired was only the equity of redemption in the property, subject to the equitable charge of the lender, who was accordingly entitled to priority over the debentures.



CHAPTER X

ADVANCES TO LOCAL GOVERNMENT AUTHORITIES

THE conduct of the accounts of local authorities, especially those of the more important bodies, has been supposed to confer a certain degree of prestige on the bankers concerned, with the result that there has been a tendency towards undue competition amongst bankers for this class of business. Competition has not always stopped at the quotation of exceptionally fine terms, nor even at the locking up of resources over long periods of time, contrary to the recognized principles of sound banking policy, but also accommodation has been granted, and accounts have been conducted, on lines other than constitutional.

The field for legitimate enterprise in this connection is a large one; how extensive may be better appreciated when it is considered that the local authorities of England and Wales receive yearly from public rates a sum estimated to exceed fifty millions. This is irrespective of what they derive from Imperial taxation and of the receipts from their considerable industrial undertakings. All these moneys, presumably, pass through the hands of bankers, and obviously, therefore, it is a branch of business that is well worth cultivating; but this is quite a different thing from saying that bankers are justified in competing for it in a spirit of rashness, or in embarking on any wide departures from established principles.

Chief amongst these authorities are Municipal Corporations, Metropolitan Borough Councils, County Councils, Urban District Councils, Rural District Councils, Education Authorities, and Guardians of the poor. Most of them are created under acts of parliament, which circumscribe their energies and strictly define their borrowing powers. There is some reason for thinking that Municipal Corporations created by royal charter may stand on a somewhat

different footing with regard to borrowings.[1] But, speaking generally, and apart from any question of abilities conferred by local acts, the borrowing powers of all these authorities are strictly controlled by the particular statute or statutes, such as the Municipal Corporations Act, 1882, the London Government Act, 1899, the Local Government Acts, the Public Health Acts, the Education Act, 1902, and the Poor Law Acts, under which each is governed; and not only is this so as regards the extent of borrowings, but also as regards purposes, time limits, and modes of procedure. As a rule, too, borrowing powers may only be exercised with the sanction of some Government department, usually now the Minister of Health. (In the case of the Metropolitan Borough Councils, of the London County Council, with right of appeal to the Minister of Health.) Borrowings not conforming with these provisions are *ultra vires* of the particular authority.[2] More often than not borrowings are made under the powers conferred by local acts, when sanction by a Government department is not requisite, but even so, powers may be exercised only in strict accordance with the conditions attaching.

For particulars of the various borrowing powers conferred by public acts, the reader is referred to the lectures on "Local Government Authorities and their Relations with Bankers," by Mr. E. J. Naldrett, delivered before the Institute of Bankers a few years since.[3] The general principle adopted by the legislature is that future ratepayers should only be charged with expenditure to the extent that they will benefit thereby, and that, consequently, all expenditure conferring only immediate benefits should be defrayed out of current rates. In the case *Smith* v. *Southampton Corporation*, 1902, Channel, J., remarked: "Nothing that I am saying and nothing that my lord has said, is to be

[1] *Vide*, p. 81; and *vide*, Lord Justice Rigby's remarks in *Attorney-General* v. *London County Council*, 1901.

[2] *Vide*, *Attorney-General* v. *de Winton*, 1906, where it was held that even the fact of audit was not binding or conclusive.

[3] *Vide*, the *Journal of the Institute* for 1905.

taken as in any way suggesting that there would be anything wrong in the course which must practically always be taken, that is, in raising temporary loans within the limits of the borrowing powers in respect of matters which require to be paid quickly, the local authority intending at some future date to raise one large loan by an issue of stock, and having necessarily to incur some small expenditure before the loan is raised." Nevertheless, in view of later rulings, it would appear that even such temporary overdrafts as are thereby indicated are not unaccompanied with risk, unless sanction has been obtained previously, and all formalities are complied with. Where, however, a very temporary overdraft, unconnected with capital expenditure, is applied for by an Urban Sanitary Authority, pending the receipt of a current rate (more especially if the rate has been already levied), it would appear that this might be granted with impunity, having regard to section 210 of the Public Health Act, 1875, which provides that such an authority may make a general district rate, which may be retrospective, in order to raise money for the payment of charges and expenses incurred at any time within six months before the making of the rate. There would, however, be a difficulty about interest, as a rate out of which to pay interest would not be valid.

The Education (Provision of Working Balances) Act, 1903, authorizes education authorities to borrow such sums as are required to provide a working balance, but only with the sanction of the Minister of Health.

If a sanction to a local authority to borrow contemplates the exercise of the power by means of a mortgage of the rates, any borrowing without a proper mortgage, under seal, would be *ultra vires*.[1] A mere undertaking to execute a mortgage would not suffice.

Again, a mortgage given for an *ultra vires* advance would not be valid.

Nor has a banker any right of set-off unless the

[1] *Vide, Rex* v. *Locke*, 1910.

accounts concerned are in respect of matters to which the same borrowing powers are applicable. When the powers are distinct there must be separate accounts, which may not be merged.[1] A banker is presumed to have notice of the borrowing powers of every local authority whose accounts he conducts; and if he allows the balance on one account to be transferred to an account that is overdrawn *ultra vires*, he does so at his peril.

Where an advance is made *ultra vires* it is open to any ratepayer to move the Attorney-General to intervene and forbid reimbursement by the authority out of any rate to be levied or other public funds under their control. See *Attorney-General* v. *Tottenham Urban District Council*, 1909, where the Court restrained the Council from repayment, by any such means as those mentioned, of an overdraft that was illegal by reason of its having been granted without Local Government Board sanction. It has even been regarded as a little doubtful, especially where the debt is of other than quite recent creation, how far the doctrine of subrogation could be successfully invoked, having regard to the recognized principle above stated that all expenditure conferring only immediate benefits must be met out of current rates.[2]

Section 235 of the Public Health Act, 1875, provides—

"Where a local authority are possessed of any land, works, or other property, for purposes of disposal of sewage, pursuant to this Act, they may borrow any moneys on the credit of such lands, works, or other property, and may mortgage such lands, works, or other property, to any person advancing such moneys, in the same manner in all respects as if they were the absolute owner, both at law and equity, of the lands, works, or other property so mortgaged The powers of borrowing conferred by this section shall, where the sums borrowed do not exceed three-fourths of the purchase money of

[1] *Vide, Attorney-General* v. *West Ham Corporation*, 1910.
[2] *Vide*, "Borrowing by Local Authorities," by Sir John Paget in the *Journal of the Institute of Bankers* for February, 1911.

such lands (but not otherwise) be deemed to be distinct from, and in addition to, the general borrowing powers conferred on the local authority by this Act. Any local authority may pay out of any rates, leviable by them for purposes of this Act, the interest on any moneys borrowed by such authority in pursuance of this section."

And Section 143 of the Municipal Corporations Act, 1882, provides—

"(1) If a borough fund is more than sufficient for the purposes to which it is applicable under this Act, or otherwise by law, the surplus thereof shall be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough. (2) If the surplus arises from the rents and profits of the property of the municipal corporation, and not from the borough rate, and the borough is a sanitary district under the Public Health Act, 1875, then the municipal corporation, as the sanitary authority for the borough, may apply the surplus in payment of any expenses incurred by them as such sanitary authority, before or after the commencement of this Act, in improving the borough, or any part thereof, by drainage, enlargement of streets, or otherwise, under the Public Health Act, 1875, or any act thereby repealed."

With reference to the matters covered by the above quoted sections, no sanction by the Minister of Health is required.

The foregoing observations, brief as they are, should suffice to convince the reader of the importance of seeking competent legal advice when considering the question of any advance, of substantial amount, to a local authority. It is quite possible there has been little, if any, actual loss of principal in connection with bankers' advances to local authorities in the past, but considerable sums have been lost by way of interest, and some advances have entailed endless trouble and heavy legal expense. It is understood that, under existing conditions, the Minister of Health

is particularly anxious for authorities to arrange borrowings locally, and the moment seems opportune, therefore, for bankers to resolve that no advance shall be made where there is the slightest doubt of the legal position, without an appropriate consent of the Minister of Health being first obtained. As temporary facilities are likely to be required to a considerable extent, the situation may even call for some modification of existing statutory powers.

NOTE.—Under the Ministry of Health Act, 1919, all the powers and duties of the Local Government Board are transferred to the Minister of Health.

CHAPTER XI

ADVANCES TO BUILDING SOCIETIES; INDUSTRIAL AND PROVIDENT SOCIETIES; FRIENDLY SOCIETIES; COMMITTEES; PARTNERSHIPS; LIMITED PARTNERSHIPS; JOINT BORROWERS; PERSONAL REPRESENTATIVES; TRUSTEES; LIQUIDATORS; RECEIVERS; AND AGENTS

Building Societies.

BUILDING societies play a considerable part in the economic activities of the country. From a comparatively humble terminating society to a large and old-established permanent institution, each, in its way, fulfils a useful purpose. The province of building societies borders on that of banks, but the boundary line between them is sufficiently well-defined. The constitution and regulations of the former are designed to equip them for a class of transactions that is outside the legitimate scope of our banking system, namely, that of granting loans of a permanent character on mortgage of real property, either to assist with purchases or to provide fixed capital for business use. The liabilities of building societies are not, as are those of banks, dischargeable at call or short notice. Building societies are not subject in the same way as are banks to sudden demands on their resources. To a certain extent they are the complements of banks. What would be bad business for a bank might be entirely desirable and legitimate from the point of view of a building society. The converse holds equally true. Building societies should not essay to invade the province of bankers in the sense of accepting deposits from the public repayable at short notice.[1] In view of the character of their assets they should be chary even of taking deposits subject to several months' notice. We had an object lesson some years since in the North of

[1] Sir John Paget observes that *Sinclair* v. *Brougham* (*vide*, pp. 80 *sqq.*) emphasizes this.

England. In so far as these societies are conducted on constitutional lines, it will be recognized there is existent a certain degree of interdependence between themselves and banks, which, in itself goes far to justify the granting of temporary accommodation by the latter for the business purposes of the societies, always assuming advances are properly secured and are kept within reasonable bounds. A mortgage to a building society usually contemplates the repayment of principal, with interest, by so many equal instalments, so that there should be a constant return-flow of funds from which to replace any temporary borrowings. But, at this stage, it becomes necessary to consider the legal aspect of the question. It will be shown that borrowing powers, where they exist at all, are strictly circumscribed, and that it is necessary for a banker to exercise the utmost care in every case.

The provisions of the principal Building Society Act, that of 1874, limit the borrowing powers of societies incorporated or registered thereunder as follows: (1) In a "permanent" building society, the amount outstanding on loan must not at any time exceed two-thirds of the amount of the members' mortgages to the society. (2) In a "terminating" building society, the amount outstanding on loan may be either a sum not exceeding two-thirds, as above, or a sum not exceeding a year's subscriptions on the members' shares for the time being in force.

The amending Act of 1894 further provides that in calculating, as above, amounts secured on properties the payments on which were a year in arrear at the date of the society's last account, and amounts secured on properties of which the society had then been a year in possession, are to be disregarded. All sums secured by the mortgages, whatever their nature, including instalments not yet accrued due, may be taken in account, however. The other short amending Acts of 1875, 1877, and 1884, are unimportant in this connection.

Unless incorporated or registered under the Act of 1874,

a building society has no borrowing powers, except so far as expressly authorized by its rules. Even if so incorporated or registered, it is necessary for the rules to show the society's intention to avail itself of such powers. It is unsafe to advance to a building society that has no borrowing powers; and if a society has powers it is important to ascertain that these are not exceeded. The desirability in such cases of making all advances on separate loan account has already been pointed out.[1] Again, borrowing powers do not, necessarily, imply mortgaging or pledging powers; or, at all events, with a society not incorporated or registered under the Act of 1874. It is also important, therefore, when considering an advance to a building society, to be satisfied that its rules clearly give the requisite powers to mortgage or pledge, and in a manner appropriate to the occasion. Otherwise, on a liquidation, the banker may find himself classed with the unsecured creditors. As regards societies incorporated or registered under the Act of 1874, it has been argued that, where borrowing powers are taken, mortgaging powers are incident thereto, "for although the Act contains no express power to give security it provides for the form of the securities which it is taken for granted will be given by a society for loans advanced to it under the borrowing power."[2] There appears to be some little doubt on the point, however; and, certainly, if the rules, upon their true construction, are inconsistent with the power (for instance, where there is a general provision that all borrowed moneys are to constitute a first charge on the assets) a specific mortgage would be invalid.

Section 43 of the 1874 Act reads—

"If any society under this Act receives loans or deposits in excess of the limits prescribed by this Act, the directors or committee of management of such society, receiving such loans or deposits on its behalf,

[1] *Vide*, p. 79.
[2] *Vide*, *Law Relating to Building Societies*, by Wurtzburg.

shall be personally liable for the amount so received in excess."

The cases of *Cunliffe Brooks & Co.* v. *Blackburn Building Society*, and *Sinclair* v. *Brougham*, as bearing on the effect of illegal borrowings, have already been referred to.[1]

Industrial and Provident Societies.

The Industrial and Provident Societies Act, 1893, provides that a registered society may, if its rules do not direct otherwise, mortgage any land; and no mortgagee or bondholder is bound to inquire as to the authority for any such mortgage. (The receipt of the society is to be a discharge for all moneys arising from or in connection with such mortgage.) Also, that no society which takes deposits may make any payment of withdrawable capital while any claim due on account of any such deposit is unsatisfied.

Friendly Societies.

The Friendly Societies Act, 1896, provides that a registered society may, if its rules so provide, mortgage its land; and no mortgagee is bound to inquire as to the authority of the trustees to effect any such mortgage.

Committees.

Committees of unincorporated bodies are not, as a rule, legal entities, and are not therefore collectively liable for overdrafts. Individuals will only be bound as by express agreement.

Partnerships.

The law of partnership was codified by the Partnership Act of 1890.

Every partner is an agent of the firm and of the other partners for the purpose of the business of the partnership; and in a general way he can bind every partner by his acts in the usual course of the business, and this notwithstanding any restriction placed on his power except

[1] *Vide*, pp. 79 and 80.

with respect to persons having notice thereof. Subject to any general rule of law relating to the execution of deeds or negotiable instruments, in the words of the Act, "an act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorized, whether a partner or not, is binding on the firm and all the partners."

Every partner is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and, after his death, his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts. Where there is a liability for wrongs, or a misapplication of property, each partner is also, so far, severally liable. But if a partner, being a trustee, improperly employs trust property in the business, no other partner is liable to the beneficiaries unless he be a party thereto; though trust funds may be followed if still in the firm's possession or under its control.

Everyone who, by words spoken or written, or by conduct, represents himself, or who knowingly suffers himself to be represented, as a partner, is liable to anyone who has, on the faith of any such representation, given credit to the firm.

A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

A partner in a non-trading firm has no implied power to borrow for his firm, or to bind it by negotiable instruments, unless the class of business warrants these things. A case decided in 1857 (*Laws* v. *Rand*) seems to suggest that he has authority to bind the firm by cheques drawn in its name.[1] Nevertheless the present writer concurs

[1] But not by post-dated cheques, as being of the nature of bills. (*Vide, Forster* v. *Mackrill*, 1867.)

in the answer given to question 1301 in *Questions on Banking Practice* (which opinion is based on the authority of *Lindley on Partnership*) to the effect that in such a case it is not prudent to assume one partner has power to borrow on the credit of the firm without inquiry. A partner in a trading firm, on the other hand, may borrow on the firm's credit, so long as the borrowings are apparently for the purposes of the business. He may also bind the firm on bills signed in the partnership name. But even if the course of business warrants the use of bills, a banker cannot rely on the implied authority where the bills are obviously being availed of for a partner's private ends.[1]

Where a partner has implied authority to borrow on behalf of his firm, "it follows almost necessarily that he should have power to pledge partnership property as a security for advances" (*Lindley on Partnership*). Although he cannot bind his co-partners by deed, he can give effective charges under hand on deeds or other documents.

A banker may not set off a partner's balance against a liability of his firm.

Subject to any agreement to the contrary, the death or bankruptcy of a partner involves the dissolution of the firm. A firm may also be dissolved by agreement between the partners, or by order of the Court.[2] On the happening of either of these events, a banker, directly it comes to his knowledge, should draw a line on all accounts of the firm if he wishes to preserve recourse. With the written request of the continuing partners he may open a new account, taking their authority to charge outstanding cheques thereto. The power of survivors to mortgage the assets of the old firm for fresh advances will depend upon circumstances.[3] They may do so to secure old advances, but unless the partnership articles so provide, a banker may only safely take a mortgage prospectively with the

[1] *Vide, Darlington District Joint-Stock Bank*, in re *Riches*, 1864.

[2] *E.g.*, on the ground of lunacy.

[3] Under sec. 38 of the Partnership Act, 1890, surviving partners can bind the firm so far as necessary for winding up and for completion of transactions begun but unfinished.

concurrence of the deceased's personal representatives; although, from a case decided in 1906 (*In re Bourne*) it would appear such concurrence is not necessary where the mortgage is given for advances to be availed of in connection with the winding up of the old firm's affairs, and the mortgage will be valid if the banker cannot be saddled with notice that his advances were being utilized for other purposes.

It will be a matter for consideration by a banker in each case how far he will grant the same accommodation to continuing partners, having regard to the fact that, in the ordinary course, a retiring partner's capital in the firm will have been converted into a liability of the firm.[1]

Limited Partnerships.

Under the provisions of the Limited Partnership Act, 1907, partnerships may be formed including one or more partners who shall not be liable beyond the amount of capital they respectively contribute, provided there are one or more partners generally liable.

A limited partner has no power to bind the firm, and his death, bankruptcy, or lunacy, does not, of itself, involve the dissolution of the partnership. If he takes part in the management of the business he renders himself generally liable for debts incurred whilst so doing. He may not withdraw his contribution during the continuance of the partnership, though, with the consent of the general partners, he may assign it.

Limited partnerships require to be registered with the Registrar of Joint Stock Companies (with particulars of contributions of limited partners, and term, if any, for which the partnership is entered into. Any changes must also be notified within seven days).

"Notice of any arrangement or transaction under which any person will cease to be a general partner in any firm, and will become a limited partner in that

[1] As previously stated (*vide*, p. 96) the deceased partner's estate remains liable for the firm's debts contracted during his lifetime.

firm, or under which the share of a limited partner in a firm will be assigned to any person, shall be forthwith advertised in the *Gazette*, and until notice of this arrangement or transaction is so advertised the arrangement or transaction shall, for the purposes of this Act, be deemed to be of no effect."

A body corporate may be a limited partner.

It may be added that the Act has been availed of but to a comparatively small extent.

Joint Borrowers.

As distinct from any question of partnership, and apart from special agreement, the death of one of two or more joint obligants releases his estate from all liability.[1]

Personal Representatives.

The Probate Act, 1857, provides as follows—

"All persons and corporations making or permitting to be made, any payment or transfer, *bonâ fide*, upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this Act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration."

"An *administrator* is appointed by the Court for the purpose of administering an estate in the case of intestacy; or in the event of no executor being named in a will. An administrator takes his title from the grant of administration (although, when appointed, his title relates back to the death); an *executor* from the will itself. The latter's title arises at the moment of death."[2]

Executors have power to pledge specific assets as security for advances even before the granting of probate, and, in

[1] Sir John Paget observes that although, in such case, the deceased's estate is released at law, it may be reached by administration proceedings in equity.

[2] *Vide, Title Deeds*, by the present writer.

practice they often do so. They, as well as administrators, are personally liable (jointly) for unsecured advances made to them; but the lender can only claim against the testator's estate by standing in the shoes of such representatives. If the representative may not recover against the estate, the lender will be debarred from doing so. If a banker acts prudently little risk is incurred in advancing to personal representatives, being persons of good reputation, for purposes of paying estate duty, or other reasonable expenditure, before production of probate or letters of administration. In this connection an executor may reasonably be asked to charge any credit balance on the account of the deceased. An administrator could not effectually do so until the grant of administration had been made. There is a bare possibility, of course, of a will, or of another will, as the case may be, being propounded, but, even so, payments made for duty, or other proper expenditure, would in equity be recoverable against the estate.

A banker is not entitled to set off the credit balance of a personal representative against the deceased's overdraft.

On any question of advances to executors for the purpose of continuing their testator's business, the bank's solicitor should advise. Much will depend upon the construction of the will in each case.

An executor has the right to pay himself out of the assets in priority to general creditors; except, perhaps, where there is an express direction in the will to pay the debts.

Trustees.

It was held *In re Crowther*, 1895, that a general gift to trustees upon trust for sale, with a proviso that a sale of the whole or any part of the testator's real and personal estate might be postponed at the discretion of the trustees, authorized the trustees to continue the business indefinitely.

Trustees, however, may not adventure more capital than was employed at the date of the testator's death.

Trustees of wills and settlements are personally liable for advances. If the trustee may not recover against the trust funds the lender will be debarred from doing so. His powers of mortgaging will depend upon the terms of the particular will or settlement.

As regards trustees in bankruptcy, under the general bankruptcy rules of 1915 (rule number 342), it is only exceptionally that cheques may be signed by a trustee alone. And the Deeds of Arrangement Act, 1914, provides that all moneys received by a trustee under a deed of arrangement shall be banked by him to an account in the name of the debtor's estate. At one time it was considered that trustees of insolvent estates were personally liable for overdrafts. It may be so still in some instances, but a prudent banker will require a written undertaking to be given in every case where the personal liability is being relied on.

A banker has a right to set off trust funds if, at the time of receipt, he had no notice of their being trust funds. But he cannot set off the balance of an account denoted with the name of a trust. Nor can he set off the balance of an account that he knows to be a trust account. Mere suspicion would not, as a rule, debar his right to do so; but the right would not extend to a case where a public official had an account under some designation connecting it with his office. There is no useful object served in refusing to open an account as a trust account when the banker is saddled with notice that it is such. Again, a banker can hardly question a transfer by his customer from the latter's trust account to his private account, in a case where he (the banker) would be constrained to cash a cheque on the trust account; but he must be careful not to be privy, in the slightest degree, to any misapplication of trust funds, or he may be held liable to replace them. Where the banker has reaped a benefit, the Court, in any proceedings, will

require to be satisfied that he has not acted otherwise than in absolutely good faith. It has been held that a banker may set off the proceeds of an auction sale of cattle paid into the auctioneer's business account (*Martin* v. *Roche Eyton & Co.*, 1885). Also, that the balance of a solicitor's "office" account may be set off against his overdraft. (*Greenwood Teale* v. *Williams, Brown & Co.*, 1894).[1]

Liquidators.

A liquidator of a company is not personally liable for borrowings. In a "voluntary" liquidation he is simply the agent of the company, and, as such, he can bind the company's assets. So he can in the case of a "compulsory" winding up, unless it is subject to supervision when the Court may impose restrictions. Under the Companies (Winding-up) General Rules of 1909 (rule number 165) the liquidator is debarred from signing cheques alone.

Receivers.

As regards receivers under debentures, their power to repay borrowed money out of the assets comprised in the debentures depends upon the terms of the debentures. A receiver may, in a particular case, have power to mortgage the assets, without recourse to the Court; but before granting the advance, the banker should obtain competent legal advice.

A receiver is not personally liable unless he has expressly made himself so. At all events this is the position where a receiver has raised a mortgage under sanction of the Court (*re A. Boynton, Limited*, 1910).

[1] NOTE.—Sir John Paget comments as follows: "The rules as to the setting off of trust funds are reviewed in *John* v. *Dodwell*, 1918, A.C. 568. The stricter view as to benefit accruing to banker is supported by Farwell, J., in *Attorney-General* v. *Winton*, 1906, 2 Ch. 106. The time at which notice of trust becomes effectual to produce set-off is not, I think, absolutely limited to receipt of the trust money. If, after receipt of the money, the banker became aware that it was trust money, he could not set it off against subsequent advances on private account."

Agents.

An agent can only bind his principal by borrowings made under express or implied authority. When the principal tacitly acquiesces in the overdraft there is a strong presumption against him that he has authorized his agent to borrow.

CHAPTER XII

UNSECURED ADVANCES

In preceding pages the subject of advances has been considered only in connection with the question of banking cover, in one or other of its multifarious forms. In actual practice, however, it is not in every case that security, apart from that afforded by a customer's worth, is forthcoming. There is such a thing as advancing to a trader on the security of a properly compiled and duly certified balance-sheet. It may also, occasionally, be impolitic to refuse temporary unsecured accommodation, for an approved specific purpose, to a private borrower of known means and standing. This is a different thing altogether from suggesting there can be any justification for advancing, without security, to a man of limited means, who is living fairly well up to an income that dies with him; or to a man of some means, for speculative purposes. Advances to private persons, without cover, should be exceptional, and never out of character; and in every case, where there is the slightest occasion for doubt, security should be insisted upon. Experience shows that it is not the man of large means who objects to give security—on the other hand it will be found that he is usually desirous of providing it—but it is the man who has no security to offer.

To know whom and whom not to trust is the test of successful bank management. Heterodox as it may sound, it is quite possible for a banker to be over-cautious. The past-master in bank management will strike the happy medium between over-caution and undue optimism; the faculty of discrimination will become developed in him to the verge of instinct.

Really there is little excuse for bad debts in connection with private accounts; but in the domain of trade there is,

and must be, a somewhat different standpoint. Risks are taken every day; they cannot altogether be avoided if any real progress is to be assured. Even were a banker to confine his activities to "pawnbroking" certain risks would be incurred. But the business of banking cannot be cribbed and cabined in this way. Scientific banking does not stop short at mere "pawnbroking"; between which and so-called "adventurous banking" there is a wide gulf fixed. It is recognized that one principal *raison d'être* of a modern bank is the facilitation of trade. A request for what would otherwise be legitimate accommodation need not necessarily be turned down solely on the ground of lack of security in a concerte form.

Gilbart wrote many years since: "A bank that is so conducted as never to make a loss will seldom make much profit."[1] This is true to-day. It is claimed, though, that where advances, even unsecured, are granted only on proper scientific lines losses will be reduced to a minimum. Occasionally they will arise—it will be found impossible to guard against every conceivable eventuality or combination of circumstances, however remote—but it will not be in connection with bad debts arising out of such reasonable trade risks as those now in contemplation that there will be serious reflection upon bank management. In the aggregate the incidental losses will be so insignificant as scarcely to ruffle the surface of a bank's continuous flow of prosperity.

The history of English banking demonstrates that the one cause, more than any other, that has conduced to bank failures in the past has been the unwarranted community of interests with some one of more big outside concerns. A banker has got "too deep in," and has not had the moral courage, in time, to face the consequences, with the result that good money has been poured out after bad in the vain hope of retrieving an impossible position. Not only has the bank, to all intents and purposes, gone into partnership

[1] *Vide, Practice of Banking.*

with the customer, but the latter has actually become the bank's master. What would have been a serious loss to such a bank would be but a matter of comparatively small moment to one of the giant institutions of to-day. It is true, outside concerns, by amalgamation and absorption, also tend to expand, but seldom in proportion to the big banks. Be that as it may, it may confidently be asserted that never will an outside concern, however important, be permitted, in its relations with any one of our principal existing banks, to become master of the situation. The lesson has been too well learned. When it becomes necessary, or even politic, to say "halt," the order will be given unflinchingly. The compulsory audit has no doubt been a factor in prompting this salutary change, but the considered scientific policy of to-day has firmly cemented the principle.

The credit balance on a business man's account is not conclusive evidence of means. He may be an agent; or may be trading largely on borrowed capital. Or, again, he may be under heavy liability on acceptance. (In this case the approximate extent should be apparent from an examination of the account.) Nor is the turnover any reliable index of a trader's profit. He may actually be conducting his business at a loss. More and more do bankers require the testimony of a properly audited balance-sheet when considering applications for accommodation from business people. Without it, an application for an unsecured advance would stand little chance of favourable consideration. Outside evidence of means would have to be overwhelming for an application to be entertained in such a case.

The question of a company's balance-sheet in relation to its debenture issue has already been dealt with to some extent.[1] The chief point for consideration in the analysis of any balance-sheet is the nature of the assets. It may be taken for granted that the liabilities are not over-stated;

[1] *Vide*, p. 77.

but what of the quality of the assets from which those liabilities may require to be discharged? It behoves a banker to examine a balance-sheet from the point of view of its potentialities for liquidation purposes—quite a different proposition from an appraisement as a going-concern. So often expenditure is carried in as asset without any regard at all to value for liquidation purposes; and, sometimes, with little regard to value even as a going-concern.

With a private firm it is necessary to inquire closely whether there is any borrowed capital beyond what may be disclosed by the balance-sheet. If lent to a partner, personally, on a liquidation it will not come into competition for dividend with the general body of the firm's creditors.

It is becoming usual to classify assets according to their attribute of convertibility. Thus, after the actual cash held, there might appear an item including everything that could quite readily be turned into cash; to be followed successively by book-debts, stocks, buildings, machinery and plant, and goodwill. Whether so classified or not, in any attempted analysis the assets should be attacked in some such order; and, if the balance-sheet itself is insufficiently informative, the requisite details should be elicited. In estimating the position for the present purpose, a progressively increasing percentage will be deducted from each item throughout. The percentages will vary in different trades and circumstances. Conceivably, the assets may have already been written down to rock-bottom, or the reserves *per contra* may be deemed sufficient for the purpose. No hard-and-fast rule can be instituted. Goodwill, of course, will be eliminated entirely. The questions of buildings, and machinery and plant, have already been dealt with.[1] The values of stocks, as they appear in the balance-sheet, should certainly not be over cost price, or market price, whichever is lower. It will be desirable to

[1] *Vide* pp. 49 *et seq.*

inquire into any marked increase in stocks, as compared with previous years. Has there been an over-valuation? Or has the increase been by reason of falling off in sales? In the latter case some of the older stock may have considerably deteriorated in value. There is always a greater or less element of uncertainty about this particular item.[1] Trading and profit and loss accounts should be compared with those of previous years. And, not only so, they may with advantage also be compared with those of similar undertakings.

When, on a reconstruction of the assets side of the balance-sheet on the lines indicated above, a figure has been arrived at which still leaves a surplus not too far short of the total liabilities, assuming the banker is dealing with people of acknowledged ability, character, and energy, that profits have been well maintained, that there are no marked adverse conditions prevailing in the particular trade, and that other untoward circumstances are not apparent, no great risk can be involved in granting "in-and-out" unsecured accommodation to the extent of, say, one-quarter of such reconstructed surplus; or even a higher proportion for a temporary particular purpose that meets with approval. People in business have their stringent times, financially, as well as their quiet seasons. All their resources may be employed in their undertaking, so that, for temporary accommodation, they may have no available security to offer. It is a counsel of perfection to say they should always have outside investments constituting a reserve that could be availed of in this connection. That may well be a firm's ultimate aim. Meanwhile, if they are deserving of financial assistance, and can show that they are so deserving, it may be taken for granted that, ordinarily, they will be able to command it, if not in one direction then in another. As has been previously pointed out, however, the case of a company with an outside

[1] In the case of unfinished goods or work, in particular, a very conservative basis of valuation should be adopted.

debenture issue, unless the issue be of but comparatively small dimensions, stands on a different footing.[1]

It is only reasonable that customers seeking unsecured accommodation should expect to pay rather higher interest rates than those who have good security to offer, especially if their accounts are to be conducted on the banker's usual commission terms as based on turnover, say of one-eighth per cent., or on larger accounts one-sixteenth, or the equivalent thereof in the shape of a minimum free credit balance. (It may, of course, pay to conduct a very large account on a finer commission rate than that just indicated; especially if the cheques drawn are mostly for considerable amounts, entailing so much less work to the banker in relation to turnover.)

Where a customer has been granted a limit of overdraft the facility may be withdrawn by due notice notwithstanding that the specified time has not expired[2]; but any cheques issued prior to the receipt of notice must be paid if coming within the limit. In the event, however, of the banker receiving notice of a subsequent charge on his security he would be entitled to return all such cheques unless specially provided for. The effect of notice by a guarantor is discussed in a previous chapter.[3]

Where an account has been overpaid in the absence of arrangement, and merely as a favour, the customer cannot rely upon the circumstance as constituting a precedent.

This chapter will be brought to a conclusion with some few remarks on the much-debated subject of *banker's lien*.

Reference has been made in previous chapters to the charging, or pledging, as the case may be, of different securities, such as deeds, certificates, and documents of title, by mere lodgment under parol agreement. The transaction is loosely spoken of as creating a banker's lien.

[1] *Vide*, p. 84.

[2] *Vide, Rouse* v. *Bradford Banking Co.*, 1894.

[3] *Vide*, p. 68.

In the strictly legal sense of the expression it is not so. In law a banker's lien is his right, unless there be some understanding to the contrary, to retain, so long as the customer is indebted to him, all the customer's negotiable securities in his hands, held by him in good faith, *qua* banker. It is a right distinct from such an agreed charge or pledge by parol as has been referred to. If, when the customer lodged the securities, the banker honestly believed them to be the customer's own property, it would be immaterial to the effect of the lien whether they were actually so or not. It is called a general lien because the relative securities can be held for general liabilities, including discounts; it even extends to debts that were statute-barred at the time the lien first arose.

It is doubtful whether a banker's lien extends to any classes of securities other than those that are negotiable. Different cases appear to point to certificates, life policies, and even some deeds, as being subject thereto; but, in certain instances, the issues have been obscured by reason of the banker's lien having been referred to in the loose sense as embracing securities that have been charged by verbal agreement. Then, again, it has been considered that a banker's lien is an implied pledge, giving the right to sell on occasion. Certainly the Bills of Exchange Act, 1882 (section 27, sub-section 3) provides that—

> "Where the holder of a bill has a lien on it, arising either by contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien."

The two sorts of lien are contemplated here—the specific lien arising out of a contract of hypothecation, and the general or banker's lien. "It is said that the banker's general lien gives him the right to realize the securities. . . . When there is a transaction amounting to a pledge of the securities this will no doubt be so. There is, however, no clear authority to support a wider view" (Smith's *Mercantile Law*).

In bankruptcy, if a banker can establish his general lien, he will have the rights, so far, of a secured creditor.

It will have been noted that the securities must be in the hands of bankers *qua* banker to enable them to establish a banker's lien, which "does not therefore extend to articles received not by them as such, but as gratuitous bailees or otherwise" (Smith's *Mercantile Law*). Now the occasions on which, say, certificates, life policies, or deeds, are in the hands of bankers *qua* banker, unless they are charged by agreement either by parol or in writing, are but seldom; so, from that point of view, the banker's lien, properly so-called (assuming it does extend to such securities) could but infrequently arise. Some authorities have suggested that it might be held to embrace certificates lodged for safe custody, where the relative dividends are received direct by the banker; but, in view of what has gone before, this seems highly improbable. It is very doubtful whether banker's lien extends to certificates in any circumstances, unless they are negotiable.[1] There are stronger grounds for thinking that it might embrace bearer bonds (as being negotiable securities), though left for safe custody, where the banker himself cuts off and collects the coupons. But there is some uncertainty even here. If there were no evidence that the bonds were left with the banker as bailee, and he relied, in good faith, on his right, presumably it could be enforced. The safest course, however, is for a banker, when he is granting accommodation, to have it in writing that everything in his hands, whether for safe custody, or otherwise, may be treated as security. There is always a danger, when taking a charge over specific securities, of the transaction being construed as an understanding that the banker would rest satisfied with these securities to the exclusion of everything else.

Akin to banker's lien is the right of *set-off*. Speaking generally, a banker is entitled to set off, and treat as

[1] *Vide*, p. 20, as to American Railroad certificates.

one, all accounts, though at different branches, provided the accounts are in the same right. In the case of current discounts, as before mentioned, it is different.[1]

NOTE.—Sir John Paget comments as follows: "I am inclined to hold that the general lien only extends to the customer's own securities (*see Cuthbert* v. *Robarts Lubbock & Co.* in the Court of Appeal, 1909, 2 Ch. 226) not necessarily negotiable. Negotiable securities, whether the customer's or belonging to other parties, are available to the banker if he takes them in good faith, the lien supplying the value (*see* per Romer, L. J., in *G.W. Rly.* v. *London & County Bank*, 1900, 2 Q.B. 464).

Personally, I am in favour of the banker's lien being an implied pledge, and so giving the rights of realization accorded to a pledgee, but I appreciate Mr. Stead's view on the matter, and coincide with his expressions as to the desirability of safeguarding the banker's position."

[1] *Vide*, p. 13.

CHAPTER XIII

THE CITY; AND CONCLUSION

"LOMBARD STREET," wrote Bagehot,[1] "is a perpetual agent between the rapidly growing districts, where almost any amount of money can be well and easily employed, and the stationary and declining districts, where there is more money than can be used."

Since Bagehot's day, by reason of the processes of amalgamation and natural expansion, whereby the banking activities of the country have become centralized in fewer hands, the distribution of the general loan fund has become more direct and more efficient. That is one of the incidental economies, a proper appreciation of which goes far, in itself, to justify the amalgamation movement. The allocation of the fund is more steadfast in character and less haphazard than could possibly have been the case formerly. Adjustments are not now so much confined as they were to the mere lifting of a few hundred thousand pounds' worth of bills from busy trading districts here and there; accommodation which, under the old *regime*, might, or might not, have been renewed, according to conditions prevailing in the London money market at any particular moment.

The "London money market" embraces the discount market, business in Treasury bills, India Council drafts, foreign exchanges, and the precious metals, as well as the market in the "short-loan" part of the general loan fund (aptly termed its "fringe"), including, as will be seen, short loans from the Bank of England.[2] This "fringe" constitutes the "play" in the machinery of the country's

[1] *Vide, Lombard Street.*

[2] Nowadays the currency note issue also enters, more or less, into the question of money supplies.

credit system, gold being the "safety-valve." One is thinking now of normal conditions.

In view of the criticisms that have been levelled at the methods of the joint stock banks, it is proposed to discuss the topic of the London money market a little closely; and if inquiry opens up questions of foreign business relations, seemingly wide of what is generally understood by the subject of "bankers' advances," the fact that London has been, and, it is hoped, will still be, the financial centre of the world, with all thereby entailed, must be the writer's excuse. The business of the country is so closely identified with foreign relations and outside circumstances, that, in reality, it is impossible to take any long view of this subject of bankers' advances without regarding the situation as a whole. The peculiar position of the London money market is a strong factor in determining the mode in which the general loan fund of the country, so far as it is under the control of the banks, may legitimately be applied. It must be constantly borne in mind that bankers' deposits are, practically, repayable on demand, whereas traders' borrowings from the bankers are not so in fact, although they may be nominally. It is absolutely necessary, therefore, to maintain sufficient "play" in the machinery in all its wide ramifications to meet every emergency.

The Bank of England, as "the banker of the bankers," holds the final reserve of the country. It also holds the Government balances. The state of the open market is reflected in the amount of the Other Deposits held by the Bank. The amount of the Other Deposits is not, however, conclusive evidence of the state of the open market at any particular moment. Bankers may be conserving their strength for some reason, thereby conducing to a certain tightness in the open market. Moreover, it is important to compare the returns for corresponding periods of the year, as there are more or less regular fluctuations in open market supplies as reflected in the Other Deposits. Thus, Public Deposits increase with the in-gathering of the

taxes, at the expense of Other Deposits. When big Government dividends are released the contrary effect is witnessed.

Although the short-loan portion of the general loan fund is inelastic outside fairly recognized limits, the movement within itself is unceasing, by reason of the huge daily settlements as between the Bank of England, the other banks, and the bill-brokers, that are effected through its agency.[1] His share in the participation of this "fringe" of the general loan fund constitutes one of the most liquid of a banker's assets: it is one of his first lines of defence.

It may be well to defer consideration of the important part played by the bill-brokers in this connection until some inquiry has been made into the origin and properties of the particular class of bills which principally interests them and their banker clients.

Bills of exchange enter very largely into the settlement of international transactions, and bills on London, especially, have for generations been held in high favour for remittance purposes, not only in connection with direct trade, but also in connection with trade outside this country. They long since came to constitute, indeed, a sort of international currency, and, incidentally, London became the clearing-house of the world. "The primary cause," says Goschen, "is the stupendous and never-ceasing exports of England. There will be a demand for bills on London bankers and English bills will be more saleable than any others. It is the universal diffusion of the products of English industry which tends to bring about the result."[2] No doubt the English system, which led to the concentration of money in the banks and to the enrichment of our money market, was a contributory cause. And, no less certainly, the fact that our enormous savings before the war enabled us to invest over two hundred

[1] At times, during the war, considerable portions of the "fringe" of the general loan fund have (through the Bank of England) done duty in Government finance.

[2] *Vide, Theory of the Foreign Exchanges.*

millions abroad yearly, thereby constantly strengthening our hold as a creditor nation, conduced to the conservation of the position. There have been other factors which may be mentioned, working in the same direction. Thus, ours was the only free gold market in the world. Then, again, London offered peculiar facilities for discounting. Finally, the utmost confidence was always reposed in the strength and integrity of our great "accepting houses."

"As regards shipments of goods to the United Kingdom, the shipper almost invariably obtains payment for those goods by selling his bill on London to the local bank; but not only that; in most cases he would prefer, when he sends goods to any part of the Continent of Europe, or to the United States, to draw a bill on London against them, leaving the purchaser to settle with the London banker. In using the term 'banker,' I include, of course, the large numbers of so-called merchant-bankers who make a speciality of this kind of business. Thus, the China merchant, who sells tea to Russia or Germany, or silks to the United States, will probably obtain payment through the medium of the London money market. There is an absolutely free market, because there is always a supply, and there is always a demand, and that really in every part of the world."[1]

In foreign trade transactions the question of commercial credit is an important factor. A trader's financial standing may be regarded here in England as satisfactory, but enough may not be known of him abroad to command the requisite credit in connection with a desired purchase. It may not be convenient for him to pay cash in advance; and even if the seller were prepared to take his acceptance there might be some difficulty in negotiating it, at all events on satisfactory terms. Hence arose the system under which "accepting houses," either merchant-bankers of world-wide reputation, or other bankers, undertake, for a

[1] *Vide*, Sir Felix Schuster's paper on "Foreign Trade and the Money Market," read before the Institute of Bankers, as recorded in their *Journal*, February, 1904.

commission, to lend their names as acceptors. The undertaking, given in the form of what is known as a "confirmed letter of credit," is irrevocable; and with such an assurance behind it the exporter finds no difficulty whatever in turning his bill into cash at once. It is in this way that the cotton trade is financed. The importer makes the necessary arrangements with an accepting house on this side, who, accordingly, send the exporter their "letter of credit" undertaking to honour, under it, certain drafts on themselves accompanied by relative documents. As soon as the cotton is on the rails, armed with the letter of credit, "through" bills of lading, consular invoice, and insurance certificate, he goes to his local bank and sells to them a relative draft on the accepting house in this country. The latter, on acceptance, retain the documents, but these, very possibly, will be lent out to the importer "on trust," as indicated in a previous chapter.[1] Be that as it may, the party obliged must, at his peril, see to it that the acceptors are put in necessary funds against the date of maturity. The bill, meantime, has probably been discounted in the London market; or, conceivably, may have gone abroad in the service of foreign exchange.

This acceptance business is very general. As Sir Felix Schuster pointed out, even traders between foreign countries, outside England, avail themselves of the services of the London accepting houses; and many foreign merchants maintain substantial balances in this country for the purpose of providing for London acceptances given on their account. Not infrequently, too, by arrangement with bankers abroad, London accepting houses accept, against documents, the drafts of exporters from this country. There is a certain variation of the system in the case where a bank here specifically instructs its agent at a foreign or colonial centre, or *vice versâ*, to pay against production of documents. The business resolves itself into a question of account between the banks concerned,

[1] *Vide*, p. 82.

and they have periodical settlements, the one drawing on the other for any resulting balance; but sometimes a reimbursement bill is drawn in respect of each transaction.

In consequence of the war, as is well known, trade with certain disorganized parts of Europe has been rendered almost impracticable. With some countries there is no "exchange"; nor can there well be until they have undergone financial reconstruction, following on more settled political conditions. An attempt is now being made to cope with the difficulties by means of the Government's £26,000,000 export credits scheme. Even in normal times, it is not, of course, suggested that the whole of our foreign trade is financed by means of "confirmed credits." The modes of settlement are varied. Much will depend on the standing of the importing firms, whether in this country or abroad; and also on the recognized customs in particular branches of trade. It may be that there is no pre-arrangement with a banker. The home or foreign exporter may draw on the importer, attaching the documents to the bill with instructions to his banker to deliver up the documents against payment, or even, where the importer's credit is high, against acceptance. (When the documents are to be attendant on the bill till payment it is known as a "documentary bill."[1]) Such bills may be sold in the country of their source; or bankers may lend against them when in their hands for collection, taking a letter of hypothecation over the

[1] *Vide*, Tillyard on *Banking and Negotiable Instruments* and Mr. Hartley Withers on *Money-Changing* in support of this definition. Sir John Paget comments as follows: "I should call a bill a documentary bill although the documents had to be given up on acceptance (*Guaranty Trust Co. of New York* v. *A. Hannay & Co.*, Court of Appeal, 1918)." Sir John suggests, too, some reference to this case as removing the danger of bankers being made liable for the genuineness of documents attached to bills which they have discounted and present for acceptance or payment. The plaintiffs negotiated a bill drawn under a banker's "confirmed letter of credit," the relative bill of lading being forged. The bankers, of course, accepted and paid the bill, and the obligees (the defendants) failed in their attempt to saddle the plaintiffs with responsibility for the genuineness of the bill of lading.

relative goods. Again, there are high-class firms trading with firms of similar standing in other countries (the business relations between them being possibly very close), who make a point of mailing documents direct to the respective consignees. In such a case it is feasible, though, perhaps somewhat unusual, for a banker to obtain an effectual security by way of a letter of hypothecation over the goods and proceeds thereof (including an assignment of the borrower's rights as unpaid seller), accompanied by a trust letter.

It is almost unnecessary to say that our imports for many years have far exceeded our exports. Our imports are mainly drawn for from abroad; and, as has been explained, to a large extent on London accepting houses under letters of credit. Our exports are paid for, far more in proportion, by remittances. The banks abroad buy drafts on London, and, in turn, sell their own drafts on this centre. Remittances are also in demand in connection with the commitments of the London accepting houses (previously alluded to) on behalf of international trade outside this country. There are further constant demands to pay for freights earned by British ship-owners, for the service of loans, for interest on capital, for bankers' commissions, etc. If the claims of one country on another are insufficient to set off the counter-claims, under normal conditions specie might be remitted; but the necessity for this measure would often be obviated by means of the creation of what are known as finance bills. These are clean bills in the sense that they are unaccompanied by documents. They are drawn by arrangement by great financial houses in one country on houses of similar standing in another, and are entirely justifiable when created for the purpose of rectifying temporary fluctuations in exchange. It is not always easy to "read" this class of paper. Many finance bills drawn on London, in normal times, are in anticipation of loans to foreign countries about to be issued here. Some represent pure speculation, but, by reason

of the high reputation of the contracting parties, they usually pass unquestioned.

It has only been within comparatively recent years that our joint stock banks have participated in the business of the accepting houses. They do so still somewhat tentatively, and show little disposition to extend their activities in this direction far beyond the circle of their own regular customers. From the point of view of convenience and economy all round, it seems desirable that institutions which have the conduct of traders' general banking business should be in a position to grant this facility likewise. The doing so does not in itself involve any actual advance; yet advances often arise out of this class of business; where, for instance, there has been unlooked-for delay in the realization of a consignment, or part thereof; or where, for other reasons, assistance may be required against the maturity of the commitments. But whilst the joint stock banks may be willing to accept in connection with imports, they are more shy about lending their names, on the invitation of banks abroad, for the purpose of assisting our export trade, as there is a feeling that the banks abroad should finance their own importers. Nor do they lay themselves out for acceptance business in connection with international trade outside this country. A certain amount may be done in these directions, working in conjunction with first-class foreign banks, or direct with merchants against cash lodgments or good security; but, for the most part, such business has been left to the private accepting houses, and, to a lesser extent, to the foreign bank agencies in London. The German bank agencies were particularly active in the cultivation of acceptance business, in which connection they maintained large balances here by way of working capital, to the great advantage of our market. Amongst accepting houses must be counted, too, the London branches of the colonial banks and of the British-owned banks operating abroad.

Bills on London, bearing names in high repute, are a

favourite form of investment in many quarters. To a marked degree they have, in the past, attracted the attention of the great continental banks. They have been sought after by many financial houses and investors in this and other countries. They also comprise the class of paper that particularly interests the London bill-brokers, and, through them, the joint stock banks.

As mentioned in a previous chapter,[1] bankers do a certain amount of discounting for their ordinary customers, but most of their discount business is conducted with the bill-brokers, who specialize in bills, and keep themselves conversant with the changing position of parties, and, moreover, are able to guarantee the genuineness of paper passing through their hands. As Bagehot says[2]: "The relative credit of different merchants is a great tradition; it is a large mass of most valuable knowledge which has never been described in books, and is probably incapable of being so described. The subject of it, too, is shifting and changing daily—in some particular years the changes are immense. No one can be a good bill-broker who has not learned the great mercantile tradition of what is called the standing of parties."

Bill-brokers act as intermediaries in the bill market. In effect they take a vast amount of trouble and responsibility off the shoulders of the banks in consideration of a small "turn" of often not more than one-sixteenth per cent.

In theory the bill-brokers are supposed to be prepared to discount all approved paper submitted to them by their clients. They have large connections amongst the business community of the country. They have connections, also, amongst those, including the London agencies of the foreign and colonial banks, who constantly have international bills to dispose of. Whilst the bill-broking companies take deposits from the public, all bill-brokers work,

[1] *Vide*, p. 8.
[2] *Vide, Lombard Street.*

more or less, on money borrowed from the banks. The cream of the bills—the "bank" acceptances already referred to, and other international paper bearing bank indorsements—they re-discount with the banks; and these are the ones of which the item "bills discounted" or "bills of exchange" on the asset side of a bank's balance sheet is normally largely comprised. At the present time the item is swollen to a marked degree by holdings of Treasury bills. (Under war conditions, of course, there were comparatively few international bills offering.) And, not only do the bill-brokers re-discount, but they also borrow large sums from the banks, either over-night, from day to day, or for short fixed periods—usually a week—against parcels of picked bills, or "floaters" (Government, and some other high-class bonds, so called because they are constantly floating about between the different banks), and usually at low rates, the higgling of the market being constantly in evidence in the shifting rate quotations. It is in this way that the short-loan portion of the general loan fund is principally requisitioned.[1] When the open market is "short," or the banks are not lending freely the bill-brokers may be constrained to tap this portion of the general loan fund through the Bank of England ("the banker of the bankers"), but they avoid resorting to the Bank of England as long as possible as the latter will exact the full official rate, or ½ per cent. over, besides imposing other special conditions.

This "fringe" of the general loan fund, then, fulfils a double mission. It constitutes a liquid form of asset for the banks. At the same time its office is to help finance those international transactions which are the basis of our money market's pre-eminence. In regarding the character of the accommodation they grant, our bankers have ever to keep in mind, not only their responsibility to their depositors, but also the importance of maintaining, unimpaired, London's position as the monetary centre of the

[1] *Vide* foot-note, p. 115.

world. It is no small tribute to that position that so many foreign banks have established agencies here. Its uniqueness, indeed, has been at once the envy and despair of half the world. As has been previously pointed out, one of the causes of this pre-eminence is the fact that discount facilities have been so readily obtainable here. Detract from those facilities and the hold will at once be weakened. Hitherto the system has worked satisfactorily. It is no answer to this statement to point to the occurrences of August, 1914. As is well known, the chief difficulty that was then experienced arose out of the physical impossibility of foreign obligees procuring "exchange" with which to meet the London accepting houses' commitments on their account. "It would be impossible for either the joint stock banks or the 'accepting-houses' to conduct their business successfully and at the same time protect themselves against the recurrence of such episodes."[1] To the exigencies of war all other considerations are subordinated. The business of finance is peculiarly affected thereby, and, if only in its own interests, it is incumbent on the Government that declares for war to come to the assistance of finance, as the British Government wisely did on this occasion, and thereby saved the situation. "A good deal of nonsense," says Mr. Hartley Withers,[2] "has been talked about the helplessness of finance in the face of this crisis and its dependence on Government assistance. All finance depends on the stability of the social structure which has to be maintained by Government. When politics go so far awry that this stability is in jeopardy, the Government has to pledge the resources of the nation to uphold the fabric of finance."

Another reason given above for our pre-eminence was that ours had been the only free gold market in the world. Withdrawals of gold mean a depletion in the short-loan

[1] *Vide*, Mr. F. R. Acheson Shorter's paper on "Foreign Banking Facilities," read before the Institute of Bankers, as appearing in their *Journal*, February, 1916.

[2] *Vide*, *War and Lombard Street*.

portion of the general loan fund, and the usual accompaniment has been an increase in the official minimum rate of the Bank of England. "Investment business in bills really acts as a pendulum to the foreign exchanges, steadying the fluctuations, and having the most important influence on the export and import of gold."[1] When rates have risen here, in relation to rates abroad, foreign operators have been induced to buy bills in this market and send funds from abroad for the purchase. Nevertheless, when specially large quantities of London acceptances are held in foreign centres, it is recognized that, for the time being, a corresponding amount of control over our reserves here is conferred upon those centres. Since the beginning of the war there has been no free gold market anywhere, but it is hoped that our own free gold market will be restored in the near future, and that the retention of gold here at a maximum figure will be rendered possible.

But what of our former annual savings, which did so much to enhance the attractiveness of our money market, and the allocation of which materially assisted us in the balancing of our foreign account? And to what extent have we receded from our former position as a great creditor nation? We are owed vast sums by our Allies and by Russia; but where in any way recoverable, to a large extent, it is feared, these must be regarded as tied up indefinitely. Yet it can be argued with some show of reason that in a considerable measure we have already paid for the war.[2] Our own loans are held very largely in this country, and the holdings are astonishingly well distributed. Moreover, to no small extent, the public seem to have paid for them out of their respective savings. It is the practised economy of the people, and the strong endeavour of our men and women, that have done so much

[1] *Vide*, Mr. Frederick Straker's paper on "The Daily Money Article," read before the Institute of Bankers, as appearing in their *Journal*, January, 1914.

[2] The reader is referred to Sir George Paish's recent address on "The Interdependence of Nations," delivered before the Institute of Bankers (*vide* their *Journal* for April, 1919).

to conserve our resources. It is true labour was diverted into unusual channels, but its ranks were reinforced from outside classes. All labour was mobilized, and the essential industries were kept going. The production of luxuries practically ceased. People denied themselves much in the way of luxury—they were constrained to do so. In the place of luxuries, in the place of most things except absolute necessities, the nation produced armaments. We sorrowed; we lived the simple life; we ate, literally, of the bread of affliction; we worked to the limits of our endurance; our clothes were "seedy"; our streets and our dwellings unkempt. But in the life of a nation these things do not really matter. Great as our sacrifices have been, as a nation we have risen superior to our environment. The world will gradually right itself. Present unsettlement is only a passing phase. Innate British genius and resourcefulness will continue to assert themselves. Once again we shall become, growingly, a creditor nation; and in the domain of finance we shall hope to see reassured that supremacy which we have come to look upon as our birthright.

In pre-war days fairly large sums were loaned from account to account to money-brokers and jobbers for employment in connection with speculation and "disguised investment" on the Stock Exchange. The borrowers were usually firms of the highest standing, and substantial margins on security were stipulated for. The rates obtained, too, were satisfactory, and the loans were looked upon as of a distinctly liquid type, although, academically at least, not regarded as forming a part of the recognized "fringe" of the general loan fund. One says "academically" advisedly, as in practice they seemed to fulfil the function thereof, and were included by bankers in the same item of their balance-sheets as short-loans to bill-brokers. When the Stock Exchange was closed the total of these loans from bankers then outstanding probably did not exceed £40,000,000. In the result this money was

"hung up" for the time being, and, doubtless, bankers will be chary about re-embarking extensively in the class of business now under review. There are other short-loans made to members of the Stock Exchange that fall under a rather different category. They arise out of business dealings that are entirely irreproachable, and may strictly be classified with the short-loan section of the London money market.

It has been said that our banks are not sufficiently "adventurous."[1] The criticisms are always of a vague character. So far as they are not merely destructive they seem to circle round the fact that our banks are not prepared to accept trading risks in the same way as did the German banks. In Germany the banks, no doubt, provided investment money as well as banking money; but the German system was entirely different from our own. The German banks acted as stock-jobbers, issuing houses, company promoters, bill-brokers, and general financiers. Their activities embraced all branches of finance, with their incidental risks. Here at home these risks are assumed by the different classes of middlemen. Further than this, the German banks practically went into partnership with their trading customers; they followed their own capital into trade, involving a degree of control and inquisitorialness that surely would not be agreeable to English minds! They even became merchant-adventurers on their own account. Their stability was directly dependent on commercial prosperity. Here at home the stability of the banks is a thing very largely apart. Herein lies the great inherent strength and recommendation of our system. When outside conditions are adverse our banks remain strong. It is only so they are able to give the requisite facilities in times of stress and danger.

Nor, as has been previously explained, is our system designed for the provision of investment money. Our

[1] The reader is referred to the paper on "Adventurous Banking," by Mr. Ernest Sykes, appearing in the *Journal of the Institute of Bankers* for March, 1916.

banks work mainly on the huge deposits of their customers, whereas the German banks had enormous capitals. It has been argued that our banks should increase their capitals on similar lines; but to increase their capitals in order to provide money for investment purposes is just what they do not want to do. The exercise of their function of conserving the stability of the financial structure would be, so far, arrested. Let the banks increase their capitals, by all means, but the funds so obtained may only be used legitimately and in accordance with established principles. The lesson has been too well learned from the black pages of our banking history. "We are asked," said the late Mr. G. H. Pownall,[1] "to substitute for our own well-tried and successful system of banking, another, contrived to meet the dissimilar conditions of Germany—a country which appears to regard trade and commerce as acts of war, and shapes its policy, not for competition, but for conquest."

Undoubtedly it was the idea of conquest that prompted the methods of the German banks. They appear, indeed, to have ridden, deliberately, for a fall. As opposed to our fluid system, the German commercial banks partook of the nature of industrial trusts. And, not only so, they were all interwoven by means of syndicating arrangements. They floated innumerable subsidiary banks and subsidiary companies at home and abroad; and, in their feverish haste for commercial and political aggrandisement, they disregarded all sense of economy and caution. Working in alliance with the Government of their country, their directors acquired great power, and aimed for economic dominion, to be followed by economic slavery, and, in particular, for the despoiling of our own supremacy. From every other standpoint capital and endeavour were misdirected. Dumping, infiltration, bounties on imports, preferential freight rates, the system of "kartelle" (agreements amongst rivals to keep consumers in their power)—all were directed to the same end. So long as the German public

[1] *Vide*, inaugural address as President of the Institute of Bankers in November, 1916.

were sufficiently gullible there was a blatant show of success. But the process of unloading became increasingly painful; and, before the outbreak of war, the German banks were seriously "blocked" by their own creations. "Must she await the inevitable crash, the stoppage of trade, the downfall of her credit, the misery which must overwhelm her people, and the fury which would perhaps possess them in consequence? Would not such a state of things make war inevitable, sooner or later, and was it not better to make war whilst there was most likelihood of its ending rapidly and victoriously in her favour? And then, the war won, would not justice be on the side of the victor, as Maximilian Harden has said? What followed is common knowledge."[1]

The British Trade Corporation has been started under good auguries, and, in the particular sphere it has carved out for itself, it, and other institutions that may be modelled on its lines, should prove useful complements to our ordinary banking machinery. As being free from any responsibility to depositors, they will be justified in "adventuring" in due proportion to their resources.

The tendency is more than ever to big industry, and big industry calls for big banks with ample resources. There have been indications that other countries are preparing to cater, extensively, for international trade requirements. In the United States, especially, corporations have been formed with this particular object avowedly in view. The necessity for closer co-operation than in the past between British and colonial banks is imperatively demonstrated. That closer working agreements are being entered into between our own banks and over-seas institutions is a welcome sign that the Empire appreciates the position and is determined to meet it.[2]

[1] *Vide, The Ruling Caste and Frenzied Trade in Germany*, by Maurice Millioud.

[2] "London banks have widened the area of their operations in such a manner that their business is now more international than it ever was, and their connections and ramifications are now really world-wide." (*Vide, The Times*, of 24th May, 1919.)

This book closes on the note on which it opened. In the period of reconstruction before us enormous accommodation will be sought from the banks. Thanks to their well-conceived policy they are possessed of huge liquid resources wherewith to meet any legitimate claims that may be made upon them. And the banks will be found sympathetic. It may be that longer credits will be asked for than is usual in normal times. Where these can possibly be granted they will be favourably considered, but it may be confidently assumed that there will be no wide divergence from basic banking principles. Banking advances are for the purpose of supplementing working capital only. They must never be allowed to become fixed.